CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 24, 1939.

CERTIORARI GRANTED MARCH 6, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX.

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit—Statement showing details of services performed, etc.	5	4
General traverse	9	5
Substitution of attorney	9	5
Argument and submission of case	9	5
Special findings of fact	10	5
Conclusion of law	28	22
Opinion, Williams, J.	28	22
Judgment	36	29
Proceedings after judgment	36	30
Clerk's certificate (omitted in printing)	37	
Stipulation to dispense with printing of exhibits	38	30
Order allowing certiorari	40	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 27, 1939.

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42403

SOUTHERN PACIFIC COMPANY, Plaintiff,

vs.

THE UNITED STATES OF AMERICA

[Ratings: Shipments moving over non-land-grant mileage of Southern Pacific Company via Klamath Falls, Ore.]

I. PETITION—Filed April 4, 1933

The Honorable Court of Claims:

The Southern Pacific Company, plaintiff, respectfully represents:

I

Plaintiff is a corporation duly created, organized and existing under the laws of the State of Kentucky, and as such corporation now is, and was during all the times hereinafter mentioned, engaged as a common carrier by railroad in the transportation of persons and property, in and through various states of the United States. Certain parts [fol. 2] of the lines operated by plaintiff were constructed with the aid of grants of land by the United States.

II

At various times during the year 1931, and thereafter, to and including March 5, 1932, plaintiff, by itself or in participation with other carriers, transported various shipments of property of the United States at the request of the defendant, by its War and other Departments, between various points in the United States.

All said shipments were made upon bills-of-lading which were issued by plaintiff, or other carrier participating in the transportation, according to a certain form prescribed by defendant, and which expressly showed that each of said bills-of-lading was "subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." Also, all said

bills-of-lading were duly accomplished to show delivery of the said shipments, and accomplished also in all other respects as required by the terms of said bills-of-lading, and of instructions therefor issued by defendant, and, in accordance therewith, charges for all said transportation were made payable to plaintiff.

III

Plaintiff presented to the defendant its respective bills, prepared on the authorized forms of defendant, for charges for all said transportation based upon the certain tariffs of your petitioner, and/or other carriers participating in the [fol. 3] transportation, and which certain tariffs were properly and legally applicable to commercial shipments, as well also to shipments for defendant, but, notwithstanding the said charges were so stated and presented, and were legally binding upon defendant, the General Accounting Office and the Disbursing Officers of the defendant refused to pay the whole of said charges, and paid only certain less amounts, so that there still is due to plaintiff a total balance of $932.97. And plaintiff says that it accepted under protest the certain less amounts mentioned herein, and that it at no time acquiesced therein.

IV

Annexed to this petition, and made a part hereof, is a statement marked "Exhibit to Petition", showing the details of the services performed, as aforesaid, namely, designating numbers of plaintiff's bills, designating numbers of Government bills-of-lading and dates thereof, points between which transportation was performed, correct amounts of freight charges (after deducting any differences accepted by plaintiff), amounts allowed, and amounts of balances claimed, and also General Accounting Office Settlement numbers and dates, all in respect of plaintiff's bills enumerated in said Exhibit.

V

Wherefore, plaintiff says there is now justly due and owing it by the United States the sum of $932.97, exclusive of all just credits and set-offs, for which amount it prays judgment, no assignment or transfer of the aforesaid claims or any interest therein having been made.

[fol. 4] Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against that Government, and believes the facts stated in this petition to be true.

Southern Pacific Company, Plaintiff, by Charles H. Bates, Its Attorney in Fact.

(Power of Attorney filed in Case C-41)

Duly sworn to by Charles H. Bates. Jurat omitted in printing.

(Here follow four photolithographs, side folios 5-8)

EXHIBIT to Petition in Court of Claims Case No.42403

SOUTHERN PACIFIC COMPANY

Statement of Freight Charges on Shipments routed and moved over Non-land-grant Mileage of SOUTHERN PACIFIC COMPANY via KLAMATH FALLS,Ore., showing Balances claimed account of unauthorized application by Government Accounting Officers of Land-grant Deductions.

I.C.C. Bill Number	Bill-of-Lading Number	Bill-of-Lading Date	From	To	Correct Freight Charges (*)	Amount Allowed	Balance Claimed	Reference to General Accounting Office Settlement Number	Reference to General Accounting Office Settlement Date
		1931							1932
8718	WQ221561	Nov. 13	Fort Lewis,Wash.	San Pedro,Calif.	1.28	1.09	0.19	T-80898	Apr.14
8719	WQ260576	Nov. 12	Portland,Ore.	SanFrancisco,Cal.	7.55	5.25	2.30	T-80893	Mar.24
	260577	"	"	"					
	260578	"	"	"					
8729	WQ366884	Nov. 20	SanFrancisco,Cal.	Clackamas,Ore.	13.69	9.48	4.21	T-80718	Mar.28
8731	WQ366890	Nov. 20	SanFrancisco,Cal.	Eugene,Ore.	1.54	1.02	0.52	T-80862	Apr.12
	WQ366834	Nov. 9	SanFrancisco,Cal.	Portland,Ore.	1.82	1.27	0.55	"	"
	366889	Nov. 20	"	"					
8732 pt	WQ366893	Nov. 20	SanFrancisco,Cal.	Portland,Ore.	0.82	0.57	0.25	T-80858	Apr. 8
8771	A-259114	Oct. 15	Pasco,Wash.	Los Angeles,Cal.	13.64	12.72	0.92	T-80968½	May 5
	259116	Nov. 12	"	"					
8785	A-20008	Nov. 16	Tillamook,Ore.	SanFrancisco,Cal.	3.53	2.98	0.55	T-81416½	June 1
8808 pt	VA486000	Nov. 20	San Francisco,Cal	Portland,Ore.	19.08	13.28	5.80	T-80960½	May 5
8806	VA-1289	Nov. 12	SanFrancisco,Cal.	Portland,Ore.	2.02	1.41	0.61	T-81310½	May 23
8842	I-152965	Nov. 13	East Portland,Ore	SanFrancisco,Cal.	4.05	2.81	1.24	T-80966½	May 5
8987	WQ268791	Nov. 12	Moscow,Ida.	Army Point,Cal.	1.19	0.84	0.35	T-80967	Apr.18
9000	WQ280586	Nov. 18	Vancouver,Wash.	SanFrancisco,Cal.	4.18	3.27	0.91	T-80968	Apr.20
	280587	Nov. 20	"	"					
9001	WQ299242	Nov. 24	Fort Lewis,Wash.	SanFrancisco,Cal.	4.87	3.33	1.54	T-80848	Apr.12
	WQ221576	Nov. 25	"	"					
9002 pt	WQ221574	Nov. 25	Fort Lewis,Wash.	Monterey,Calif.	49.31	42.56	6.75	T-80949	Apr.20
9003	WQ221565	Nov. 17	Fort Lewis,Wash	SanFrancisco,Cal.	4.44	3.55	0.89	T-80970	Apr.18
9004	WQ221563	Dec. 2	Fort Lewis,Wash.	Tuba City,Cal.	1.45	1.06	0.39	T-80864	Apr. 7
9005 pt	WQ221573	Nov. 25	Fort Lewis,Wash.	San Jose,Cal.	1.13	0.86	0.27	T-80845	Apr.12
	221585	Dec. 3	Fort Lewis,Wash.	Alameda,Cal.	1.12	0.84	0.28	"	"
9006	WQ330554	Oct. 2	Seattle,Wash.	SanFrancisco,Cal.	6.33	4.78	1.55	T-80866	Apr. 7
9007	WQ341264	Nov. 25	Seattle,Wash.	Army Point,Cal.	70.70	55.83	14.87	T-80807	Apr. 2
	234151	Dec. 4	"	"					
	361233	Nov. 13	"	"					
	234150	Dec. 4	"	"					
	234152	Dec. 7	"	"					
	304306	Dec. 4	Spokane,Wash.	Army Point,Cal.					
9008	WQ221566	Nov. 13	Fort Lewis,Wash.	Army Point,Cal.	237.89	183.98	53.91	T-80867	Apr.12
9009	WQ260593	Dec. 2	Eugene,Ore.	Army Point,Cal.	1.82	1.16	0.66	T-80868	Apr. 8
9010	WQ171799	Nov. 26	Fort Stevens,Ore.	SanFrancisco,Cal.	12.89	10.38	2.51	T-80721	Mar.28
9011	WQ260581	Nov. 27	E.Portland,Ore.	SanFrancisco,Cal.	97.51	68.22	29.29	T-80717	Mar.28
9024	WQ346603	Nov. 25	Army Point,Cal.	Corvallis,Ore.	171.74	113.58	58.16	T-80869	Apr.12
9029	WQ346504	Nov. 25	Army Point,Cal.	Corvallis,Ore.	5.57	3.74	1.83	T-80806	Apr. 2
	346584	Nov. 21	Army Point,Cal.	Clackamas,Ore.					
			Totals of Sheet A		741.87	550.87	191.00		

(*) Amounts shown in this column are after deducting any differences in charges accepted by Company.

(Sheet 3)-7

S.P.Co. Bill Number	Bill-of-Lading Number	Bill-of-Lading Date	From	To	Correct Freight Charges (*)	Amount Allowed	Balance Claimed	Reference to General Accounting Office Settlement Number	Reference to Settlement Date
		1931							1932
P-9026	WQ346636	Dec. 9	Army Point,Cal.	Corvallis,Ore.	1.05	0.88	0.17	T-80791	Apr. 1
9027	WQ367226	Dec. 8	SanFrancisco,Cal.	Corvallis,Ore.	18.36	12.74	5.62	T-80859	Apr. 8
	367227	Dec. 8	"	Portland,Ore.					
	367270	Dec. 12	"	"					
	367269	Dec. 12	"	"					
9028	WQ346958	Nov. 24	SanFrancisco,Cal.	Clackamas,Ore.	23.80	17.04	6.76	T-80792	Apr. 4
	367101	Nov. 24	"	"					
	367229	Dec. 8	"	"					
9187	I-186738	Nov. 11	SanFrancisco,Cal.	Chemawa,Ore.	33.75	24.94	8.81	T-82036½	July 26
	1889	Nov. 20	"	"					
9215	A-229118	Nov. 30	Pasco,Wash.	Los Angeles,Cal.	13.03	11.43	1.60	T-80964½	May 5
9216	A-130634	Nov. 10	Portland,Ore.	Los Angeles,Cal.	3.48	2.86	0.62	T-81152½	May 17
9334	WQ278517	Dec. 22	Vancouver,Wash.	Army Point,Cal.	9.08	6.74	2.34	T-80896	Apr.14
9336	WQ221594	Dec. 11	Fort Lewis,Wash.	SanFrancisco,Cal.	3.30	2.45	0.85	T-80897	Apr.13
9341	WQ278501	Dec. 5	Corvallis,Ore.	Army Point,Cal.	1.97	1.30	0.67	T-80972	Apr.18
9342	WQ260582	Nov. 28	E.Portland,Ore.	SanFrancisco,Cal.	133.41	93.11	40.30	T-8086	Apr. 8
	260587	Dec. 14	"	"					
9347	WQ346635	Dec. 9	Army Point,Cal.	Oregon City,Ore.	32.88	22.16	10.72	T-80984	Apr.18
	346670	Dec. 18	Army Point,Cal.	Clackamas,Ore.					
9348	WQ346867	Dec. 18	Army Point,Cal.	Eugene,Ore.	1.40	0.84	0.56	T-80973	Apr.18
9349-pt	WQ367487	Dec. 18	SanFrancisco,Cal.	Amity,Ore.	1.49	1.10	0.39	T-81081	Apr.22
	367482	Dec. 18	SanFrancisco,Cal.	North Bend,Ore.	2.32	1.66	0.66		
	367489	Dec. 18	SanFrancisco,Cal.	Hubbard,Ore.	1.49	1.02	0.47		
	367473	Dec. 18	SanFrancisco,Cal.	McMinnville,Ore.	1.43	1.13	0.30		
	367469	Dec. 18	SanFrancisco,Cal.	Willamina,Ore.	1.64	1.23	0.41		
	367490	Dec. 19	SanFrancisco,Cal.	Sheridan,Ore.	1.58	1.18	0.40		
	367478	Dec. 18	SanFrancisco,Cal.	Marshfield,Ore.	2.32	1.67	0.65		
	367472	Dec. 18	SanFrancisco,Cal.	Salem,Ore.	3.06	2.09	0.97		
	367471	Dec. 18	SanFrancisco,Cal.	Salem,Ore.					
	367479	Dec. 18	SanFrancisco,Cal.	Woodburn,Ore.	4.56	3.13	1.43		
	367480	Dec. 18	SanFrancisco,Cal.	Woodburn,Ore.					
	367481	Dec. 18	SanFrancisco,Cal.	Woodburn,Ore.					
	367470	Dec. 18	SanFrancisco,Cal.	Eugene,Ore.	3.90	2.57	1.33		
	367484	Dec. 18	SanFrancisco,Cal.	"					
	367482	Dec. 18	SanFrancisco,Cal.	Portland,Ore.	11.65	8.11	3.54		
	367483	Dec. 18	"	"					
	367468	Dec. 18	SanFrancisco,Cal.	Cottage Grove,Ore	1.68	1.36	0.32		
	367460	Dec. 18	SanFrancisco,Cal.	Gervais,Ore.	1.52	1.04	0.48		
9417	VA-1290	Nov. 12	SanFrancisco,Cal.	Portland,Ore.	0.82	0.57	0.25	T-81310½	May 23
9418	VB486036	Dec. 8	SanFrancisco,Cal.	Portland,Ore.	0.84	0.58	0.26	T-81310½	May 23
9484	E-810242	Dec. 10	Portland,Ore.	Napa Junction,Cal.	2.93	2.05	0.88	T-81432	June 7
9487	E-824552	Dec. 10	Bremerton,Wash.	San Pedro,Cal.	3.73	3.37	0.36	T-81462½	June 8
	E-824570	Dec. 15	"	"					
9591	A-130643	Dec. 9	Los Angeles,Cal.	Portland,Ore.	5.85	4.82	1.03	T-80970½	May 5
9595	A-172833	Nov. 16	Orofino,Ida.	San Leandro,Cal.	5.84	5.09	0.75	T-81302½	May 23
9600	A-168571	Dec. 11	Portland,Ore.	Fresno,Cal.	16.54	12.91	3.63	PreAudit letter March 8,1932 (T-FIN-Sch.3-583)	
9601 pt	A-155823	Nov. 6	SanFrancisco,Cal.	Detroit,Ore.	3.93	2.77	1.16	T-80958½	May 5
9691	VB-81382	Dec. 15	Seattle,Wash.	Stockton,Cal.	1.09	0.83	0.22	T-80891	Apr.12
9726	E-824704	Dec. 23	Bremerton,Wash.	San Pedro,Cal.	74.48	66.11	8.37	T-81250½	May 20
	824729	Dec. 24	"	"					
			Totals of Sheet 3		430.16	322.88	107.28		

(*)Amounts shown in this column are after adjusting any differences in charges accepted by Company.

S.P.Co. Bill Number	Bill-of-Lading Number	Bill-of-Lading Date	From	To	Correct Freight Charges (*)	Amount Allowed	Balance Claimed	Reference to General Accounting Off ce Settlement Number	Reference to General Accounting Off ce Settlement Date
		1931							1932
9756	I-197224	Dec. 21	E.Portland,Ore.	SanFrancisco,Cal.	7.29	5.06	2.23	T-82022½	July 25
9757	I-197218	Dec. 21	E.Portland,Ore.	Stewart,Nev.	199.95	146.29	53.66	T-82024½	July 26
9758	I-197220	Dec. 21	E.Portland,Ore.	San Carlos,Ariz.	18.10	16.22	1.88	T-82048½	July 29
9832	WC321570	Dec. 21	Clackamas,Ore.	SanFrancisco,Cal.	2.16	1.49	0.67	T-80861	Apr. 3
9834	WC278505	Dec. 18	E.Portland,Ore.	SanFrancisco,Cal.	223.99	155.52	68.47	T-80902	Apr.14
	278511	Dec. 21	"	"					
9839	WC367483	Dec. 18	San Francisco,Cal	McMinnville,Ore.	2.92	2.15	0.77	T-81062	Apr.20
	367459	Dec. 18	SanFrancisco,Cal.	Hubbard,Ore.					
9853	A-130638	Dec. 21	Portland,Ore.	Los Angeles,Cal.	3.17	2.61	0.56	T-81150½	May 20
9854	A-259120	Dec. 23	Pasco,Wash.	Los Angeles,Cal.	6.38	4.77	1.61	T-81304½	May 23
9860	A-130629	Dec. 26	Los Angeles,Cal.	Salem,Ore.	1.29	1.05	0.24	T-80962½	May 5
9874	B-835834	Dec. 24	Butte,Mont.	SanFrancisco,Cal.	2615.40	2299.80	315.60	T-81952½	July 5
	835832	Dec. 24	"	"					
	835838	Dec. 24	"	"					
		1932							
9909	WC364282	Jan. 8	Fort Lewis,Wash.	SanFrancisco,Cal.	36.41	29.26	7.06	T-80981	Apr.18
	364287	1931 Dec. 30	"	"					
		1932							
9910	WC234158	Jan. 7	Seattle,Wash.	SanFrancisco,Cal.	1.40	1.06	0.34	T-80982	Apr.18
9913	WC368734	Jan. 16	Army Point,Cal.	Corvallis,Ore.	8.86	5.87	2.99	T-80974	Apr.18
	368739	Jan. 16	"	"					
9916	WC367671	Jan. 12	SanFrancisco,Cal.	Canby,Ore.	2.87	2.43	0.44	T-81058	Apr.20
	367711	Jan. 12	SanFrancisco,Cal.	Grants Pass,Ore.					
9917	WC367847	Jan. 20	SanFrancisco,Cal.	Corvallis,Ore.	4.16	2.83	1.33	T-80975	Apr.19
9924	WC367700	Jan. 12	SanFrancisco,Cal.	McMinnville,Ore.	1.28	1.00	0.28	T-81045	Apr.20
	367706	Jan. 12	"	"	1.48	1.15	0.33		
	367704	Jan. 12	SanFrancisco,Cal.	Salem,Ore.	2.93	2.00	0.93		
	367703	Jan. 12	"	"					
	367686	Jan. 12	SanFrancisco,Cal.	Hillsboro,Ore.	1.33	1.03	0.30		
9925	WC367834	Jan. 13	SanFrancisco,Cal.	Salem,Ore.	1.27	0.87	0.40	T-80983	Apr.20
	367826	Jan. 13	"	Clackamas,Ore.	87.72	60.75	26.97		
	367825	Jan. 13	" "	Corvallis,Ore.	3.17	2.16	1.01		
		1931							
10018	WC332281	Dec. 19	E.Portland,Ore.	SanFrancisco,Cal.	43.89	30.32	13.27	T-80999	Apr.20
10027	WC278507	Dec. 19	Portland,Ore.	Monterey,Cal.	15.46	12.69	2.77	T-80999	Apr.20
10029	WC332279	Dec. 19	Portland,Ore.	Aviation Field, Cal.	29.71	21.53	8.18	T-80999	Apr.20
10034	WC278528	Jan. 12	Vancouver,Wash.	Army Point,Cal.	1.21	0.88	0.33	T-80999	Apr.20
10035	WC361395	Jan. 15	Seattle,Wash.	San Pedro,Cal.	8.37	4.64	0.73	T-81080	Apr.20
10036	WC364254	1931 Dec. 22	Fort Lewis,Wash.	SanFrancisco,Cal.	6.09	4.87	1.22	T-81081	Apr.20
10037	WC364265	1932 Jan. 11	Fort Lewis,Wash.	Monterey,Cal.	17.66	15.20	2.46	T-81107	Apr.25
	221599	1931 Dec. 15	"	"					
10038	WC331018	1931 Oct. 27	Seattle,Wash.	SanFrancisco,Cal.	1.14	0.86	0.28	T-81032	Apr.19
10042	WC344755	1932 Jan. 23	Army Point,Cal.	Corvallis,Ore.	4.09	2.71	1.38	T-81107	Apr.25
10043	WC367617	Jan. 5	SanFrancisco,Cal.	Portland,Ore.	1.66	1.16	0.50	T-81033	Apr.19
10044	WC367828	Jan. 13	SanFrancisco,Cal.	Portland,Ore.	1.12	0.77	0.35	T-81027	Apr.19
10045	WC367618	Jan. 5	SanFrancisco,Cal.	Clackamas,Ore.	2.18	1.51	0.67	T-81028	Apr.20
			Totals of Sheet C		3342.82	2842.51	500.71		

(*) Amounts shown in this column are after deducting any differences in charges accepted by Company.

S.P.Co. Bill Number	Bill-of-Lading Number	Bill-of-Lading Date	From	To	Correct Freight Charges (*)	Amount Allowed	Balance Claimed	Reference to Land Accounting Office Settlement Number	Reference to Land Accounting Office Settlement Date
		1932							1932
10046pt	WQ367792	Jan. 12	SanFrancisco,Cal.	Portland,Ore.	27.17	18.88	8.29	T-81110	Apr.27
	367716	Jan. 12	"	"					
	367715	Jan. 12	"	"					
	367714	Jan. 12	"	"					
	WQ367705	Jan. 12	SanFrancisco,Cal.	Eugene,Ore.	1.74	1.31	0.43		
	WQ367688	Jan. 12	SanFrancisco,Cal.	Wheeler,Ore.	1.92	1.67	0.25		
	WQ367877	Jan. 20	SanFrancisco,Cal.	Monroe,Ore.	1.82	1.27	0.55		
		1931							
10167	I-146208	Dec. 21	Swank,Wash.	Berkeley,Cal.	100.03	81.85	18.18	T-81488½	June 13
		1932							
10310	T-111748	Jan. 16	Army Point,Cal.	North Bend,Ore.	6.50	5.14	1.36	T-81511	June 10
10311	T-130046	Jan. 16	SanFrancisco,Cal.	Gardiner,Ore.	1.94	1.36	0.58	T-81418½	June 1
10312	T-130045	Jan. 16	SanFrancisco,Cal.	Toledo,Ore.	1.93	1.48	0.45	T-81412½	June 1
10349	C-42376	Jan. 20	Portland,Ore.	SanFrancisco,Cal.	58.57	40.77	17.80	T-81476½	June 8
10350	C-42375	Jan. 4	SanFrancisco,Cal.	Portland,Ore.	60.86	42.36	18.50	T-81976½	July 6
10516	WQ304329	Jan. 22	Moscow,Ida.	Army Point,Cal.	1.60	0.84	0.76	T-81111	Apr.25
10523	WQ278533	Jan. 25	Vancouver,Wash.	Army Point,Cal.	1.21	0.82	0.39	T-81111	Apr.25
10534	WQ367600	Jan. 22	Tacoma,Wash.	SanFrancisco,Cal.	132.06	98.71	33.35	T-81111	Apr.25
10525	WQ364274	Jan. 27	Fort Lewis,Wash.	SanFrancisco,Cal.	3.33	2.47	0.86	T-81111	Apr.25
10533	WQ367991	Jan. 28	SanFrancisco,Cal.	Clackamas,Ore.	100.02	69.27	30.75	T-81110	Apr.27
10534	WQ367972	Jan. 30	SanFrancisco,Cal.	Portland,Ore.	2.82	1.96	0.86	T-81110	Apr.27
	368055	Feb. 6	"	"					
10574	A-161034	Dec. 9	SanFrancisco,Cal.	Portland,Ore.	2.01	1.39	0.62	T-81414½	June 1
10787	A- 24253	Feb. 11	SanFrancisco,Cal.	Portland,Ore.	0.82	0.57	0.25	T-81470½	June 8
11183	A- 24245	Feb. 17	SanFrancisco,Cal	Portland,Ore.	1.78	1.53	0.25	T-81468½	June 8
	162853	Mar. 5	Emeryville,Cal.	Grants Pass, Ore.					
			Totals of Sheet D		508.13	373.65	134.48		

(*) Amounts shown in this Column are after deducting any differences in charges accepted by Company.

RECAPITULATION.

	Correct Freight Charges	Amount Allowed	Balance Claimed
Sheet A. . . .	$ 741.57	$ 550.57	$ 191.00
Sheet B. . . .	430.16	322.88	107.28
Sheet C. . . .	3,242.82	2,842.61	500.21
Sheet D. . . .	508.13	373.65	134.48
Grand Total .	$5,022.68	$4,089.71	$ 932.97

[fol. 9] II. General Traverse—Filed May 11, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

W. W. Scott, Acting Head, Court of Claims Division.

III. Substitution of Attorney of Record

The petition in this case was filed by Mr. Charles H. Bates, as attorney of record.

On May 8, 1934, Mr. Bates withdrew his appearance as attorney in the case.

On May 21, 1934, James R. Bell, Esq., filed a power of attorney and was entered as attorney of record.

IV. Argument and Submission of Case

On March 9, 1938, this case was argued and submitted on merits by Mr. James R. Bell, for plaintiff, and by Mr. Louis R. Mehlinger, for defendant.

[fol. 10] V. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Williams, J.—Filed June 6, 1938**

Mr. James R. Bell for the plaintiff. Mr. Louis R. Mehlinger, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for the defendant.

The court, upon the report of a commissioner and the evidence, makes the following

Special Findings of Fact

1. Plaintiff is a corporation duly organized under the laws of the State of Kentucky, and as such corporation now is, and was during all the times hereinafter mentioned, engaged as a common carrier by railroad in the transporta-

tion of passengers and property to, through, and between various States of the United States, including the States of California and Oregon.

2. During December, 1931 and January 1932, plaintiff transported certain property of the United States, on Government bills of lading, for the Quartermaster Corps, United States Army, War Department, and for the Department of Commerce, Bureau of Lighthouses, described as follows:

(a) 2 carloads of bran from East Portland, Oregon, to San Francisco, California, on Government bills of lading WQ 278505, dated December 18, 1931, and WQ 278511, dated December 21, 1931, Southern Pacific Company Bill No. F 9824.

[fol. 11] (b) 2 crates of derrick booms, with winches and attachment parts and counter weights, from East Portland, Oregon, to San Francisco, California, on Government bill of lading WQ 332281, dated December 19, 1931, Southern Pacific Company Bill No. F 10026.

(c) 26 cylinders gas, H. P., pinch, steel (or iron), not plated, over 25 pounds pressure, under red label, from Portland, Oregon, to San Francisco, California, on Government bill of lading C 42376, dated January 20, 1932, Southern Pacific Company Bill No. F 10349.

(d) 26 cylinders gas, H. P., pinch, steel (or iron), not plated, 25 pounds or less pressure, under white label (empty) from San Francisco, California, to Portland, Oregon, on Government bill of lading C 42375, dated January 4, 1932, Southern Pacific Company Bill No. F 10350.

3. The five shipments referred to in finding 2 were selected by plaintiff as typical of all the shipments set out in its petition and plaintiff claims that they suffice to cover the entire matter at issue between plaintiff and defendant and were selected by plaintiff for this purpose in order to shorten the presentation to the Court.

4. The 5 shipments described in paragraphs (a), (b), (c), and (d) of finding 2 were unrouted by the shipper representatives of defendant as to any particular line of railroad or route of the plaintiff between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments.

5. Plaintiff, during the period of the shipments involved in this case, operated and now operates two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, in part owned by it and in part leased by it from its subsidiary, Central Pacific Railway Company, owner, both of which lines or routes were and are maintained and operated by plaintiff for freight, passenger and all classes of traffic.

Both of these routes or lines of railroad, maintained and operated by plaintiff, are shown on the map, plaintiff's exhibit 23, which is made a part hereof by reference.

[fol. 12] Cascade Route

6. (a) One of such routes or lines of railroad, for purpose of ready reference called of record the Cascade Route, between Portland, Oregon, and San Francisco, California, is shown on plaintiff's exhibit 23 by a combination red and blue line between Portland, Oregon, and Springfield Junction, Oregon, by a solid blue line between Springfield Junction, Oregon, and Black Butte, California, by a combination red and blue line between Black Butte, California, and Tehama, California, by a solid blue line between Tehama, California, and San Francisco, California, and may be described as beginning at Portland, Oregon, thence southerly, a distance of 126.84 miles, to Springfield Junction, Oregon, thence from Springfield Junction, Oregon, via Oakridge, Cascade Summit, Paunina, Kirk, and Klamath Falls, Oregon, to Black Butte, California, a distance of 275.60 miles, thence from Black Butte, California, to Tehama, California, a distance of 131.99 miles, thence from Tehama, California, via Willows, Cortena, Harrington, and Woodland, California, to Davis, California, a distance of 110.70 miles, thence from Davis, California, via Suisun and Martinez, California,

to San Francisco, California, a distance of 79.90 miles. The total distance via this route between Portland, Oregon, and San Francisco, California, is 725.03 miles and between East Portland, Oregon, and San Francisco, California, 724.33 miles, there being .7 of a mile between Portland and East Portland, Oregon.

(b) Under Acts of Congress lands were granted in aid of construction of 258.13 miles of this line or route of rail-

road, described and referred to above as the Cascade Route, being 126.14 miles between East Portland, Oregon, and Springfield Junction, Oregon, and 131.99 miles between Black Butte, California, and Tehama, California. The other parts of this route or line of railroad, including the Cascade Line between Springfield Junction, Oregon, and Black Butte, California, via Oakridge, Cascade Summit, Paunina, Kirk and Klamath Falls, Oregon, were not constructed with the aid of land grants and are not land grant lines. For this land grant mileage, 258.13 miles, on these sections of [fol. 13] this line or route, plaintiff is and was obligated to transport property or troops of the United States for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service.

(c) The land grant deduction proportion of charges to the public at large or private parties, based on lawfully published and effective tariff rates for transportation service via this Cascade Route, described hereinbefore, between Portland, Oregon, and San Francisco, California, was and is 17.801 per cent and such land grant deduction proportion of such charges based on such tariff rates applicable via this route between East Portland, Oregon, and San Francisco, California, was and is 17.819 per cent.

Siskiyou Route

7. (a) The other route or line of railroad maintained and operated by plaintiff between Portland and East Portland, Oregon, and San Francisco, California, referred to of record for purpose of ready reference as the Siskiyou Route, is shown on plaintiff's exhibit 23 by the combination red and blue line between Portland, Oregon, and Springfield Junction, Oregon, by the solid red line between Springfield Junction, Oregon, and Black Butte, California, by the combination red and blue line between Black Butte and Tehama, California, by the solid red line between Tehama and Roseville, California, by the uncolored line between Roseville and Davis, California, and by the solid blue line between Davis and San Francisco, California. This route or line of railroad may be described as beginning at Portland, Oregon, thence southerly, a distance of 126.84 miles, to Springfield Junction, Oregon, thence from Springfield Junc-

tion, Oregon, via Drain, Roseburg, Grants Pass, Ashland, and Siskiyou, Oregon, to Black Butte, California, a distance of 300.42 miles, thence from Black Butte to Tehama, California, a distance of 131.99 miles, thence from Tehama to Roseville, California, a distance of 104.61 miles, thence from Roseville westerly to Davis, California, a distance of 31.10 miles, thence from Davis, California, via Suisun and Martinez, California, to San Francisco, California, a dis-[fol. 14] tance of 79.90 miles. Total distance between Portland, Oregon, and San Francisco, California, via this route is 774.86 miles and between East Portland, Oregon, and San Francisco, California, 774.16 miles.

(b) Under Acts of Congress lands were granted in aid of construction of 663.16 miles of this route or line of railroad, being 126.14 miles between East Portland, Oregon, and Springfield Junction, Oregon, 300.42 miles between Springfield Junction, Oregon, and Black Butte, California, via Drain, Roseburg, Grants Pass, Ashland, and Siskiyou, Oregon, 131.99 miles between Black Butte and Tehama, California, and 104.61 miles between Tehama and Roseville, California. Other parts of this route between East Portland and Portland, Oregon, and between Roseville, California, and San Francisco, California, were constructed without the aid of land grants and are not land grant lines. These land grant sections constitute the line of railroad via the Siskiyou Route between East Portland, Oregon, and Roseville, California. For this land grant mileage, 663.16 miles, on this line between East Portland, Oregon, via the Siskiyou Route and Roseville, California, plaintiff is and was obligated to transport property and troops of the United States for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service.

(c) the land grant deduction proportion of charges to the public at large or private parties, based on lawfully published and effective tariff rates for transportation service via this Siskiyou Route, described hereinbefore, between Portland, Oregon, and San Francisco, California, was and is 42.792 percent and such land grant deduction of such charges based on such tariff rates applicable via this route between East Portland, Oregon, and San Francisco, California, was and is 42.831 percent.

8. (a) As shown on plaintiff's exhibit 23 there is in addition to the two routes hereinbefore described as the Cascade Route and the Siskiyou Route, a route of plaintiff between Portland, Oregon, and San Francisco, California, shown on this exhibit in combination red and blue between, Portland, [fol. 15] Oregon, and Springfield Junction, Oregon, a distance of 126.14 miles, in solid blue between Springfield Junction, Oregon, and Black Butte, California, a distance of 275.60 miles, in combination red and blue between Black Butte, California, and Tehama, California, a distance of 131.99 miles, in solid red between Tehama, California, and Roseville, California, a distance of 104.61 miles, uncolored between Roseville, California, and Davis, California, a distance of 31.10 miles, and in solid blue from Davis, California, to San Francisco, California, a distance of 79.90 miles. The total distance via this route between Portland, Oregon, and San Francisco, California, is 750.04 miles and between East Portland, Oregon, and San Francisco, California, 749.34 miles. Of these mileages, 362.74 miles are 50 percent land grant lines as heretofore described.

(b) The land grant precentage proportions of mileage of these lines of railroad described in this finding are 24.182 percent between San Francisco, California, and Portland, Oregon, and 24.204 percent between San Francisco, California, and East Portland, Oregon. These lines of railroad via this route are a combination of parts of the routes described as the Cascade Route and the Siskiyou Route between Portland, Oregon, and San Francisco, California, in findings 6 and 7.

9. Plaintiff also operated and operates and had and has rates applicable via another route consisting of that part of the Siskiyou Route described in finding 7 between Portland, Oregon, and Tehama, California, shown on plaintiff's exhibit 23 in combination red and blue between Portland, Oregon, and Springfield Junction, Oregon, in solid red between Springfield Junction, Oregon, and Black Butte, California, and in combination red and blue between Black Butte, California, and Tehama, California, and that part of the Cascade Route described in finding 6, shown on plaintiff's exhibit 23 in solid blue, between Tehama, California, and San Francisco, California.

10. For the reasons hereinafter set forth, plaintiff's lawfully published and effective tariff rates charged the pub-

lic at large or private parties, on the particular shipments of the property described in finding 2 between East Port-
[fol. 16] land, Oregon, and San Francisco, California, and Portland, Oregon, and San Francisco, California, applicable a the Cascade Route described in finding 6, were lower between these points or terminals than plaintiff's lawfully published and effective tariff rates charged the public at large or private parties for like transportation service, applicable via the Siskiyou Route described in finding 7.

Such tariff rates applicable via the Cascade Route were restricted to such route by provisions contained in the tariffs and did not apply via any other route between Portland or East Portland, Oregon, and San Francisco, California, this being the route described in finding 6, for convenience called the Cascade Route, except that the rates are applicable via any other route where such other route is utilized for the movement of shipments by plaintiff as indicated on page 517 of tariff rates filed with the Interstate Commerce Commission, which is plaintiff's exhibit 1 and made a part hereof by reference.

11. Charges to the public at large or private parties based on the lawfully published and effective tariff rates on the shipments described in finding 2, restricted to and applicable only via the Cascade Route between Portland or East Portland, Oregon, and San Francisco, California, described in finding 6, less the land grant deduction proportions of 17.801 per cent and 17.819 per cent respectively, applicable via such route as set out in paragraph (c) of finding 6, made lower net charges to the defendant on the shipments of the particular property between such terminals, involved in this case, than the charges to the public at large or private parties, based on lawfully published and effective tariff rates applicable via the route between Portland or East Portland, Oregon, and San Francisco, California, described in finding 7, called for ready reference the Siskiyou Route, less the land grand deduction proportions of 42.792 per cent and 42.831 per cent respectively, applicable via such route, as set out in paragraph (c) of finding 7.

Such net charges to the Government, applicable via the Cascade Route, were the lowest via any route of plaintiff between Portland or East Portland, Oregon, and San Francisco, California.

[fol. 17] 12. (a) Plaintiff assessed charges for the transportation service, described in finding 2, based on the lowest lawfully published and effective tariff rates, for the transportation of such shipments, restricted to and applicable only via the Cascade Route, less the land grant deduction proportion of 17.801 per cent for transportation between Portland, Oregon, and San Francisco, California, and 17.819 per cent for transportation between East Portland, Oregon, and San Francisco, California, resulting in the lowest net charges to the Government via any route of plaintiff between Portland or East Portland, Oregon, and San Francisco, California, referred to in finding 11. Plaintiff's Bills Nos. F 9824, F 10026, F 10349, and F 10350 were rendered to defendant on the basis of such lowest net charges for this transportation service between Portland or East Portland, Oregon, and San Francisco, California.

(b) The defendant, through its General Accounting Office, Comptroller General of the United States, made payments to the plaintiff for this transportation service described in finding 2, on the basis of deducting from the total charges computed by applying the lawfully published and effective tariff rates for like transportation service to the public at large or private parties, which rates were restricted to and applicable only via the Cascade Route described in finding 6, between Portland or East Portland, Oregon, and San Francisco, California, the land grant deduction proportions of 42.792 per cent and 42.831 per cent respectively, applicable to tariff charges to the public at large or private parties for transportation service between such points or terminals via the Siskiyou Route described in finding 7, via which route such low tariff rates did not apply, as set out in finding 10.

(c) Plaintiff duly protested to the General Accounting Office of defendant each of such payments or settlements as inadequate.

13. (a) The part of the line of the railroad of plaintiff described as the Siskiyou Route in finding 7, between Roseville, California, and East Portland, Oregon, was constructed in two sections. One section was constructed from the vicinity of Roseville, California, to the California-Ore-[fol. 18] gon State line under a land grant act providing for the construction of a line of railroad through the Sacra-

mento Valley and Shasta Valley in California. This part of the line was completed in 1887. The other section of the line was constructed from East Portland, Oregon, to the Oregon California State line under a land grant act providing for a line of railroad from East Portland, Oregon, to the Oregon-California State line passing through the Willamette Valley, the Umqua Valley, and the Rogue River Valley in Oregon. This part of the line was completed in 1887 and the two sections of the line completely connected in December 1887.

(b) The section of the line of railroad between Roseville, California, and Sacramento, California, was constructed in 1869. The line of railroad between Sacramento and San Francisco, California, via Davis, Suisun, and Oakland, California, was connected up in 1870.

14. (a) The parts of the line of railroad or route of plaintiff described in finding 6 as the Cascade Route, between East Portland and Springfield Junction, Oregon, and between Black Butte, California, and Tehama, California, are parts of the line of railroad described in finding 13.

(b) The line of railroad between San Francisco, California, and Davis, California, via Fairfield and Suisun, California, was completed in 1870.

(c) The line of railroad from Davis, California, via Woodland, Harrington, Cortena, and Willows, California, to Tehama, California, was completed in 1882.

(d) The history of and reasons for the construction of that part of plaintiff's line of railroad, called for convenience the Cascade Route, between Black Butte, California, and Springfield Junction, Oregon, via Klamath Falls, Kirk, Paunina, Cascade Summit, and Oakridge, Oregon, shown on plaintiff's exhibit 23 by a solid blue line, are:

In 1905, plaintiff acquired a logging road, extending from Weed, California, just north of Black Butte, California, to Grass Lake, California. This logging road was reconstructed for operation and for the purpose of reaching the timber extended to Bray, California, in 1907; to Ady, Oregon, in 1908; to Klamath Falls, Oregon, in 1909; to Chilo- [fol. 19] quin, Oregon, in 1911; and to Kirk, Oregon, in 1912, serving forest and agricultural areas on that line, the timber areas extending substantially from Grass Lake, Cali-

fornia, to Kirk, Oregon, and the principal agricultural areas being in the vicinity of Klamath Falls, Oregon, in the Klamath basin.

About the time of the commencement of construction of the above-mentioned line of railroad north from Grass Lake, California, to Bray, California, plaintiff constructed a line of railroad from Springfield Junction, Oregon, to Springfield, Oregon. A line of railroad had previously been constructed, a part of which was between Springfield, Oregon, and Natron, Oregon, completed to Natron, Oregon, in 1891. Thereafter this Cascade line, shown in solid blue on plaintiff's exhibit 23, was projected to serve timber areas on either side of the Cascade Mountains, the line from Natron, Oregon, southeasterly to Oakridge, Oregon, being completed in 1912. This line of railroad was projected also for the ultimate object of crossing the Cascade Mountains and forming a connection with the main line of the Central Pacific Railway in Nevada or with the lines of the Union Pacific Railroad in eastern Oregon, both plaintiff Southern Pacific Company and the Union Pacific system then being under one control. It was also projected with the ultimate object of connecting up with the line hereinbefore described as being completed to Kirk, Oregon, in 1912.

In 1911, 1912, 1913, and 1914, plaintiff constructed a line of railroad from Fernley, Nevada, a point on its subsidiary, Central Pacific Railway, to Westwood, California, shown in black or uncolored line on plaintiff's exhibit 23, serving a large timber area and sawmill interest at Westwood and Susanville, California. Plaintiff also projected a line of railroad, known as the Modoc Northern Railroad, from Klamath Falls, Oregon, to connect up with the line from Fernley, Nevada, to Westwood, California, which line passed through the heart of the Klamath Falls agricultural area and a large timber area between that basin and Westwood Junction, California.

Plaintiff, by acquisitions and construction, completed the line of railroad between Fernley, Nevada, and Klamath Falls, Oregon, connecting there with the Cascade Route, in [fol. 20] 1929, this line of railroad being shown on plaintiff's exhibit 23 in black or uncolored line.

The construction of the lines of railroad from Springfield Junction, Oregon, was stopped at Oakridge, Oregon, and from Black Butte, California, was stopped at Kirk, Oregon, and from Fernley, Nevada, was stopped at West-

wood Junction, California, because of suits brought attacking control of plaintiff Southern Pacific Company by the Union Pacific and control of the Central Pacific Railway by plaintiff Southern Pacific Company. No further construction of these lines was undertaken until these suits were disposed of and the Interstate Commerce Commission in 1923 approved the leasing of the Central Pacific Railway by the plaintiff. Immediately thereafter construction was resumed on the Cascade line between Oakridge and Kirk, Oregon, and this line of railroad connected up September 1, 1926. This completed the construction of this part of the Cascade Route between Black Butte, California, and Springfield Junction, Oregon, via Klamath Falls, Pannina, Cascade Summit, and Oakridge, Oregon.

The lines of railroad described in this finding opened up a large area producing a substantial tonnage of forest and agricultural products and other commodities, afforded a 237 mile shorter transcontinental route between northern California and Oregon and transcontinental eastern destinations and a slightly shorter and less costly operated line between California and Oregon.

The primary purpose for the construction of a portion of the Cascade Route or non-land-grant line, from Oakridge, Oregon, to Kirk, Oregon, a distance of 118 miles, commonly called the Natron Cut-off, owned by the Central Pacific Railroad, was the development of local traffic, which was almost wholly dependent on the exploitation of timber resources, and the completion of an alternate line between Weed and Springfield Junction over which traffic could be handled more economically than by the existing line, the Siskiyou Route or land-grant line, and moving substantially all freight between Weed and Springfield Junction.

15. Since the completion of the construction of the lines of railroad described in finding 14, plaintiff has had and [fol. 21] now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou route, described in finding 7, serving the valleys and areas described in finding 13, producing much tonnage of timber, agricultural products, livestock, etc., and the other the Cascade route, described in finding 6, also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. Plaintiff has maintained the Sis-

kiyou route, transporting a substantial and varied traffic and serving a large and important area. The Siskiyou route and the Cascade route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines.

On through shipments moving between San Francisco and Portland plaintiff had issued instructions to route such shipments from Eugene via Klamath Falls to Black Butte over the portion of plaintiff's line called the Cascade Route or non-land-grant line, principally for economical reasons. In certain seasons of the year special conditions made it more desirable to move shipments, such as bananas and livestock, over the Siskiyou Route or land-grant line between Black Butte and Eugene, notwithstanding the general rule to route all traffic over the Cascade Route or non-land-grant line. In certain other instances, traffic was moved over the Siskiyou Route north for a considerable distance into Eugene and thence south over the Cascade Route rather than continue it south from intermediate points. In other instances, where there were two trains leaving Eugene going south, shipments would be diverted from one train to another to fill out the train on the other route rather than run an extra train over the other route.

The instructions to route all traffic over the Cascade Route upon the conditions hereinbefore stated resulted in diverting from the Siskiyou Route 1,275,000 tons of traffic a year southbound, consisting chiefly of forest products, and 250,000 tons a year, northbound, consisting mainly of groceries and vegetables.

Plaintiff's scheduled train service between Black Butte and Eugene via the Cascade Route included two manifest or through freight trains southbound and one northbound [fol. 22] in addition to local train service. Between Black Butte and Springfield via the Siskiyou Route there was only one local freight train each way. Passenger train service included three trains each way over the Cascade Route and only one train each way over the Siskiyou Route.

16. Upon the completion of the Siskiyou route in 1887, plaintiff established through rates between Oregon and California points and sought traffic between Portland, Oregon, and points north and California destinations, including San Francisco, that had theretofore been transported

by coastwise ships between Oregon and California ports. Plaintiff, in order to share in the traffic, was compelled to make very low rates between Portland, Oregon, and San Francisco, California, and other points on San Francisco Bay, charging at the same time higher rates from, to, and between intermediate points on this line of railroad. This continued until 1910 when, because of an amendment to the Fourth Section of the Interstate Commerce Act, which made this unlawful without authority of the Interstate Commerce Commission, plaintiff was required to apply to and secure authority from the Interstate Commerce Commission to charge more for the transportation of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. Plaintiff made applications to the Interstate Commerce Commission for such authority and in 1912 in Long and Short Haul Docket 1243, 22 I. C. C. 366, the Interstate Commerce Commission granted plaintiff authority to continue lower rates between Portland, Oregon, and San Francisco, California, and found in its report that the San Francisco-Portland rates were forced by water competition and were lower than normal, fair and reasonable rates. Under subsequent decisions of the Commission and under plaintiff's applications filed in 1910 and not decided by the Commission, plaintiff continued the application of the lower port or terminal rates over the Siskiyou route between Portland, Oregon, and San Francisco, California.

In 1920 the Fourth Section of the Interstate Commerce Act was again amended by Act of Congress, in which it [fol. 23] was required that these lower rates between the ports or terminals could not be established or maintained unless shown to the Interstate Commerce Commission to be reasonably compensatory, and in connection with which it was necessary to show that the higher rates at intermediate points were reasonable rates. Following this 1920 amendment to the Fourth Section of the Interstate Commerce Act, the Interstate Commerce Commission reopened all previous Fourth Section authorities which has been granted plaintiff on this Siskiyou line to meet water competition and set these cases for hearing, together with all applications involving water competition that had not theretofore been heard and disposed of. Hearings were had in

1922 but the case was not decided by the Interstate Commerce Commission until 1927, 129 I. C. C. 3, in which the Interstate Commerce Commission found that the port-to-port rates were lower than reasonable maximum rates and were compelled by water competition and granted plaintiff authority to maintain certain rates between the ports lower than intermediate rates on conditions prescribed.

In the meantime, the Cascade route, described in finding 6, had been completed, September 1, 1926, and operation commenced.

The lower rates between the ports, including Portland, Oregon, and San Francisco, California, which the commission prescribed or permitted as reasonably compensatory in the above-mentioned decision in 1927, were so much higher than the rates of the competing water lines that plaintiff could not share in the business.

Plaintiff's presentation to the Interstate Commerce Commission on the record in this case made in 1922 was based on the cost of operation over the land grant line via Ashland, Oregon, on the Siskiyou route.

Because of this inability to compete with the water lines, plaintiff obtained from the Commission a reopening of this decision rendered in 1927. On the new record made in 1927 and 1928, plaintiff, in order to show the reasonably compensatory nature of the lower rates between the terminals, including Portland, Oregon, and San Francisco, California, based its presentation on the transportation conditions and [fol. 24] cost of operation on the Cascade line or route, shown in solid blue on plaintiff's exhibit 23, between Black Butte, California, and Springfield Junction, Oregon, which had been completed since the 1922 hearings on the old applications.

The cost of hauling freight over the Cascade line or route between Black Butte, California, and Springfield Junction, Oregon, is substantially less than the cost of hauling freight over the Siskiyou route between Black Butte, California, and Springfield Junction, Oregon. The Cascade route is 24 miles shorter between these points than the Siskiyou route and substantially reduces the grades, curvatures, and operating difficulties encountered in the haul over the Siskiyou Mountains through Ashland, Medford, Grants Pass, and Roseburg, Oregon, on the Siskiyou route.

On the record made in 1927 and 1928 based on transportation conditions existing on the Cascade route referred to, the Interstate Commerce Commission granted plaintiff authority to maintain lower rates between the terminals, including Portland, Oregon, and San Francisco, California, than to intermediate points, subject to certain minimum rates and minimum differentials over the prevailing water rates with a provision that computation of the minimum rates which were based on mileage should be made over the operated routes via which the rates were to be applied. In December 1932 the Interstate Commerce Commission, in 190 I. C. C. 273, modified certain of these minimum rate provisions but not the requirement that the rates should be based over the line of operation via which the rates applied.

17. In the report and order of the Interstate Commerce Commission entered in July 1930, 165 I. C. C. 373, all existing Fourth Section orders granted plaintiff were cancelled and all existing applications of plaintiff denied, which necessitated the cancellation of the lower Fourth Section terminal or port rates which plaintiff had theretofore maintained in effect over the land grant line via Ashland, the Siskiyou route. In compliance with this decision of the Commission in 1930, plaintiff revised the entire rate structure between California and Oregon to conform with this Fourth Section decision. The Fourth Section rates author-[fol. 25] ized by the Commission between the terminals or ports, including Portland, Oregon, and San Francisco, California, were applied over the Cascade line or route, effective November 11, 1931.

The rates via the Siskiyou route, including those between Portland, Oregon, and San Francisco, California, were revised effective November 11, 1931, so as to remove prohibited departures from the provisions of the Fourth Section of the Interstate Commerce Act in the rates between the terminals or ports. Plaintiff established rates via the Siskiyou route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates to, from, and between intermediate points on the Siskiyou route, which were lower than the rates theretofore found to have been reasonable on that line by the Interstate Commerce Commission. These were the rates in effect via the Siskiyou route during the period of the shipments in-

volved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by the plaintiff via the Siskiyou route.

18. During the period September 1, 1926, to November 10, 1931, the Fourth Section rates lower between the terminals or ports than to intermediate points were the same via both the Siskiyou and Cascade routes. On November 11, 1931, the very low rates between the ports via the Siskiyou route, previously established under the relief granted by the Interstate Commerce Commission, were discontinued and these port-to-port rates increased approximately 100 per cent, except that the lower rates via the Cascade Route also applied via the Siskiyou Route when that route was used by plaintiff for economical reasons. In the decision of the Interstate Commerce Commission in 1927, hereinbefore referred to, authorizing these Fourth Section terminal rates via the Siskiyou route, it was required that the rates at intermediate points should in no instance be more than 100 per cent higher than the rates contemporaneously in effect on like traffic between the ports.

19. In October 1931, prior to the revision of rates via Siskiyou and Cascade routes, effective November 11, 1931, plaintiff gave written notice to the Coordinator of Traffic of [fol. 26] the Federal Traffic Board of defendant in Washington, who was in charge of routing Government freight, of the proposed changes in rates via these routes, the manner in which same would be applied, and advised such Coordinator of Traffic that either the Siskiyou route or the Cascade route could and would be used and that the plaintiff would respect the Government's routing as to either line. Further, that the Fourth Section terminal rates via the Cascade route less the land grant deductions via that route that would be available would make a less net charge to the Government than the use of the rates applicable via the Siskiyou route. Receipt of this communication was acknowledged by the Coordinator of Traffic in October 1931.

20. On approximately 75 per cent of the traffic transported by plaintiff on the routes between Oregon and California, the lawfully published and effective tariff rates are, and have been since 1931, the same via both the Siskiyou and Cascade routes, including rates between Portland or East Portland, Oregon, and San Francisco, California. On

approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade route have been since 1931 and are now lower than via the Siskiyou route. The plaintiff sought from the time prior to 1926 to 1931 to secure authority from the Interstate Commerce Commission to put in very low rates between the terminals to compete with the water lines. A very small percentage of freight traffic of plaintiff between Portland or East Portland, Oregon, and San Francisco, California, is Government business. A substantial part of such shipments of defendant moves on rates which are the same via both the Siskiyou and Cascade routes.

21. The shipments of defendant described in finding 2 were transported by the plaintiff between Portland or East Portland, Oregon, and San Francisco, California, via that part of the Cascade Route described in finding 6 between Portland or East Portland, Oregon, and Tehama, California, including the line shown in solid blue on plaintiff's exhibit 23 between Black Butte, California, and Springfield Junction, Oregon, via Klamath Falls, Kirk, Paunina, Cascade Summit, and Oakridge, Oregon, via the land grant [fol. 27] section of the line shown in solid red on plaintiff's exhibit 23 between Tehama, California, and Roseville, California, via the black or uncolored line between Roseville, California, and Davis, California, and via the line shown in solid blue on plaintiff's exhibit 23 between Davis, California, and San Francisco, California. As set out in finding 10, the lawfully published and effective tariff rates of plaintiff charged defendant for this transportation service did not apply via this line of movement between Tehama, California, and San Francisco, California, via Roseville, California. At the time of the movement of these shipments during the depression there was not enough traffic to divide over the two routes between Tehama, California, and San Francisco, California, and it was more economical to handle shipments through Roseville.

22. (a) If defendant is not entitled to greater land grant mileage proportion deductions than existed and exist on the Cascade Route, described in finding 6, via which the tariff rates charged were restricted and only applied, there is unpaid, due and owing the plaintiff from defendant the sum of $116.31 for the transportation of property of the defendant described in finding 2.

(b) If defendant is entitled to the additional land grant mileage proportion deduction for the land grant mileage between Tehama, California, and Roseville, California, via which these shipments were transported by plaintiff, but via which the tariff rates charged did not apply, there is unpaid, due and owing the plaintiff from the defendant the sum of $86.62 for the transportation of the property of the defendant described in finding 2.

(c) If the defendant is entitled to the percentages of deductions determined on the ratio of the land-grant miles to the total miles between Portland, Oregon, and San Francisco, California, and between East Portland, Oregon, and San Francisco, California, included in the Siskiyou Route described in finding 7, from the full amount of compensation computed on the basis of tariff rates applicable over and restricted to the Cascade Route described in finding 6 for like transportation performed for the public at large, plaintiff has been paid all it was entitled to receive for transporting the shipments described in finding 2.

[fol. 28] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, therefore the petition is dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

WILLIAMS, Judge, delivered the opinion of the court:

Plaintiff, at the times here material, owned and operated, and now owns and operates, two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, both of which lines or routes are maintained and operated by plaintiff for the transportation of passenger, freight, and all classes of traffic.

The two routes or lines of railroads owned and operated by the plaintiff are designated in the record, respectively,

as the Siskiyou Route and the Cascade Route. The Siskiyou Route is 774.86 miles between Portland, Oregon, and San Francisco, California, and runs in a southerly direction from Portland to Springfield Junction, Oregon, a distance of 126.84 miles, thence from Springfield Junction, Oregon, via Drain, Roseburg, Grants Pass, Ashland, and Siskiyou, Oregon, to Black Butte, California, a distance of 300.42 miles, thence from Black Butte to Tehama, California, a distance of 131.99 miles, thence from Tehama to Roseville, California, a distance of 104.61 miles, thence from Roseville westerly to Davis, California, a distance of 31.10 miles, thence from Davis, California, via Suisun and Martinez, California, to San Francisco, California, a distance of 79.90 miles, making the total distance between Portland, Oregon, and San Francisco, California, 774.86 miles and between East Portland, Oregon, and San Francisco, California, 774.16 miles.

Congress granted lands in aid of the construction of 663.16 miles of the Siskiyou Route, that portion of the [fol. 29] route between East Portland, Oregon, and Roseville, California. The other parts of the route were constructed without the aid of grants of land. The percentage of deduction, computed on the ratio of land-grant miles to the total miles included in the route is 42.792 percent between Portland, Oregon, and San Francisco, California, and 42.831 percent between East Portland and San Francisco.

The Cascade Route or line was completed by the plaintiff in 1926, and like the Siskiyou Route runs from Portland, Oregon, to San Francisco, California, a distance of 725.03 miles, and 724.33 miles between East Portland, Oregon, and San Francisco, California, there being .7 of a mile between Portland and East Portland, Oregon. The Cascade route or line includes 258.13 miles of the Siskiyou line, 126.14 miles between East Portland, Oregon, and Springfield Junction, Oregon, and 131.99 miles between Back Butte, California, and Tehama, California, being portions of that route which had been constructed by the aid of land grants. In other words the land-grant mileage of the Siskiyou line or route between East Portland and Springfield Junction, Oregon, and that part of the land-grant mileage between Black Butte, California, and Tehama, California, are common to both the Cascade and the Siskiyou Routes. The other parts of the Cascade Route or line were not constructed with the aid of land grants and are not land-grant

lines. The percentage of deduction, computed on the ratio of land-grant miles to the total miles included in the Cascade Route is 17.801 percent between Portland, Oregon, and San Francisco, California, and 17.819 percent between East Portland and San Francisco.

During December 1931 and January 1932, plaintiff transported certain property of the United States, on Government bills of lading, for the Quartermaster Corps, U. S. Army, War Department, and for the Department of Commerce, Bureau of Lighthouses, as follows:

(a) 2 carloads of bran from East Portland, Oregon, to San Francisco, California, on Government bills of lading WQ 278505, dated December 18, 1931, and WQ 278511, dated December 21, 1931, Southern Pacific Company Bill No. F 9824.

[fol. 30] (b) 2 crates of derrick booms, with winches and attachment parts and counter weights, from East Portland, Oregon, to San Francisco, California, on Government bill of lading WQ 332281, dated December 19, 1931, Southern Pacific Company Bill No. F. 10026.

(c) 26 cylinders gas, H. P., pinch, steel (or iron), not plated, over 25 pounds pressure, under red label, from Portland, Oregon, to San Francisco, California, on Government bill of lading C 42376, dated January 20, 1932, Southern Pacific Company Bill No. F 10349.

(d) 26 cylinders gas, H. P., pinch, steel (or iron), not plated, 25 pounds or less pressure, under white label (empty) from San Francisco, California, to Portland, Oregon, on Government bill of lading C 42375, dated January 4, 1932, Southern Pacific Company Bill No. F 10350.

These five shipments were selected by the plaintiff as typical of numerous other shipments, set out in its petition, and are presented by plaintiff as sufficient to cover the entire matter at issue between the plaintiff and the defendant, and were selected by plaintiff for this purpose in order to shorten presentation of the issues to the court.

The shipments were unrouted by the shipper representatives of the defendant as to any particular line of railroad of the plaintiff between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of the shipments. At the time of the movement

of these shipments, there was not enough traffic to divide over the two routes between Tehama, California, and San Francisco, California, and it was more economical to handle shipments through Roseville, California. These shipments were therefore transported via that part of the Cascade Route between Portland or East Portland, Oregon, and Tehama, California, and that part of the Siskiyou Route between Tehama, California, and San Francisco, California, via Roseville, Davis, and Suisun, the part of the route between Davis, California, and San Francisco, California, being also part of the Cascade Route.

From the time the Cascade Route was completed in 1926 to November 10, 1931, the rates in effect between Portland, Oregon, and San Francisco, California, were the same over [fol. 31] both the Cascade and the Siskiyou Routes, and charges for services performed for the Government over either route were computed at tariff rates less land-grant deductions determined on the ratio of land-grant miles to the total miles included in the Siskiyou Route. In the meantime, for reasons stated in detail in the Findings, unnecessary to be restated here, plaintiff secured authority from the Interstate Commerce Commission to increase the existing rates (in some instances 100 percent) over the Siskiyou Route and reduce the rates over the Cascade Route. After this change in rates had become effective, on about 25 percent of the freight traffic transported by plaintiff on these routes the lawfully published and effective tariff rates by the Cascade Route were lower than via the Siskiyou Route, while on approximately 75 percent of the freight transported by plaintiff on the two routes the lawfully published and effective tariff rates were and are the same via both the Siskiyou and the Cascade Routes. The particular shipments in question came within the 25 percent on which the applicable rates via the Cascade Route were lower than the applicable rates via the Siskiyou Route between the points of origin and destination of the shipments.

Plaintiff had notified the defendant of the proposed change in rates and that either route would be used for Government shipments, but that the lower rates less land-grant deductions for the land-grant mileage in the Cascade Route would be available and make a net less charge to the Government than the use of the increased rates less land-grant deductions via the Siskiyou Route.

The plaintiff in its bill to the defendant assessed charges for the transportation of the shipments involved on the basis of the lowest published and effective rates applicable via the Cascade Route less land-grant deductions determined on the ratio the land-grant mileage of the Cascade Route bore to the total mileage of that route. The defendant through the General Accounting Office made settlement, as it had previously done since the completion of the Cascade Route, on the basis of the lowest published and effective tariff rates for such shipments applicable via the Cascade Route less land-grant deductions determined on the [fol. 32] ratio of land-grant miles to the total miles in the Siskiyou Route.

This suit is for the recovery of the difference in charges claimed, computed at tariff rates applicable via the Cascade Route less land-grant deductions determined on the ratio of land-grant miles to the total miles in the Cascade Route, and the amount paid by the defendant at the same rates via the Cascade Route less land-grant deductions determined on the ratio of land-grant miles to the total miles in the Siskiyou Route.

The method of settlement with plaintiff used by the General Accounting Office in this case has been consistently and uniformly followed by the defendant's accounting officers for more than fifty years in cases involving the same or similar questions. The principle was stated by the second Comptroller of the Treasury in a decision April 17, 1888, as follows:

If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided as though the transportation were over the original line.

This rule as stated has been uniformly observed in the settlement of accounts for government transportation of property and troops of the United States, and has been applied in settlement of accounts for transportation rendered the Government where through service has been rendered by a shorter line substituted in whole or in part for the longer aided and original line. (See stipulations of the

parties in United States v. Northern Pacific Railroad Co., 30 Fed. (2d) 655). This long established rule has been acquiesced in by land-grant railroads generally and was acquiesced in by this plaintiff during the period between the completion of its Cascade line in 1926 to 1931 when its accounts against the Government for the transportation of Government property were settled in this manner. It was not until the shipments involved in this suit were moved that plaintiff made protest against the position of the Government. We do not regard the fact the rates between [fol. 33] San Francisco and Portland were the same over both routes between 1926 and 1931 as material or altering in any way the principle involved.

While this administrative construction is not binding on the plaintiff or the court, and it is the duty of the court to determine the rights and obligations of both the plaintiff and the Government by the provisions of the Act of Congress making the grant of lands, yet the rule of law is well established in decisions too numerous for citation here that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The rule is fortified when the administrative construction has been acquiesced in for a like period by the adverse or opposite party as the land-grant railroads have done in this case.

The method of settlement used by the Comptroller General in this case was approved in United States v. Northern Pacific Railway Co., supra. The plaintiff in that case owned and operated a through line of railroad between St. Paul, Minnesota, and Seattle, Washington, which has been constructed by the aid of Federal land grants. Subsequent to the construction of the road plaintiff built certain cut-offs without the aid of land grants which straightened and shortened the length of the road. Through traffic was routed over the line thus straightened and shortened. The Government in making settlement with the railroad company for certain transportation made land-grant deductions on the basis of the original land-grant mileage. The railroad company contended that the land-grant deductions should be based on the original land-grant mileage less the non-land-grant mileage of the cut-off sections. The court sustained the method of settlement made by the Government

and allowed the land-grant deductions on the basis of the original land-grant mileage. The court said:

For its own convenience in competition with other roads, and perhaps for other reasons, it has shortened its line by 47.64 miles and over the line thus shortened or straightened it routes all its through traffic.

* * * * * * *

[fol. 34] The amount at stake in the case at bar is inconsiderable, but the principle involved is far-reaching in its potential consequences. If the slight deviations from the recognized land-grant route, brought about by these cut-offs, be accepted as the establishment of a new route, partially absolved from land-grant reductions in fares, it would be easy, under the rule thus laid down, by degrees to whittle away the reserve rights of the Government.

One of the undoubted purposes of the plaintiff in the construction of the Cascade Route was the establishment of an alternate line between San Francisco and Portland over which through traffic could be handled more expeditiously and economically than over its existing Siskiyou Route. It was obviously plaintiff's intention to use the new segments or cut-offs between Springfield Junction and Black Butte via Klamath Falls, and between Tehama, California, and San Francisco via Davis, for through traffic in lieu of the land grant parts of the Siskiyou Route between Portland and San Francisco which lie between Black Butte and Eugene, Oregon, via Ashland, and between Tehama and Roseville, practically abandoning through traffic thereon, and that is exactly what happened. When plaintiff for economical reasons issued instructions, as shown in Finding 15, to route all through shipments moving between San Francisco and Portland over the Cascade Route between Eugene and Black Butte via Klamath Falls, and between Tehama and San Francisco via Davis, 1,275,000 tons of southbound traffic and 250,000 tons of northbound traffic a year were diverted from the Siskiyou Route to the Cascade Route. While the land-grant portions of the Siskiyou Route between Springfield Junction and Black Butte via Ashland, and between Tehama and Roseville, have not been abandoned by the plaintiff and have been kept in good repair and are open for through traffic between San Francisco and Portland, the practical effect of the tariff provisions restricting the application of the lower scale of rates via

the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare instances. There could be no inducement to a shipper to use the route via the old land-grant line in view of excessive rates and plaintiff's general routing practice in [fol. 35] operating its manifest or through train service over the Cascade Route with only local train service scheduled and operating over the Siskiyou Route.

Plaintiff in our opinion may not deprive the Government of its lawful land-grant deductions from charges for transportation for through shipments between San Francisco and Portland accruing to it on account of land grants made in the construction of its Siskiyou line by routing the shipments over new segments or cut-offs connecting with that line, constructed without the aid of land grants. If it is permitted to do that it may continue to construct new segments without the aid of land grants until an entirely new line constructed without any aid of land grants parallels the Siskiyou line from San Francisco to Portland, thus depriving the Government of its entire land-grant deductions for services that should be furnished between San Francisco and Portland over the old route.

For the reasons stated we think the method used by the General Accounting Office in making payment to plaintiff for its services in transporting the shipments in question was correct and proper and that plaintiff has been paid all that it is entitled to receive. In any event we are not prepared to overturn the long established administrative method used in making like settlements with land-grant railroads.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

Whaley, Judge; Littleton, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 36]

VI. Judgment

At a Court of Claims held at the City of Washington on the 6th day of June, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

VII. Proceedings After Entry of Judgment

On July 19, 1938, the plaintiff filed a motion for a new trial.

On November 14, 1938, the court entered the following order on said motion:

Order

It is Ordered this 14th day of November, 1938, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 37] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 38] Supreme Court of the United States

Stipulation to Dispense with Printing of Exhibits—Filed January 25, 1939

It is hereby stipulated and agreed by and between the parties hereto that plaintiff's Exhibit 23, made a part of Special Findings of Fact 5 of the Court of the Claims and plaintiff's Exhibit 1 and page 517 thereof, made a part of such Special Findings of Fact 10 by reference, need not be printed, it being agreed, however, that nine copies of said Exhibit 23 will be filed by the petitioner for the use of the Court in considering the petition for certiorari.

Robert H. Jackson, Solicitor General of the United States. James R. Bell, Counsel for Southern Pacific Company, Petitioner.

Dated, Washington, D. C., January 25, 1939.

[fol. 39] [File endorsement omitted.]

Endorsed on cover: File No. 43,098. Court of Claims. Term No. 613. Southern Pacific Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed January 24, 1939. Term No. 613, O. T., 1938.

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 6, 1939

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JAN 24 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JAMES R. BELL,
Counsel for Petitioner.

Index to Petition.

	Page
Summary and short statement of the matter involved	1
Reasons relied on for the allowance of the writ	8
Prayer	14

Table of Cases Cited.

Boeing Air Transport v. *Farley*, 75 F. (2d) 765	10
Brothers v. *United States*, 250 U. S. 88	9
Brownyard v. *Union P. R. Co.*, 148 I. C. C. 444	7
Caminetti v. *United States*, 242 U. S. 470	11
Crocker v. *United States*, 240 U. S. 74	9
Doggett v. *Railroad Company*, 99 U. S. 72	11
Finance Docket 2873, 82 I. C. C. 185	3
Houghton v. *Payne*, 194 U. S. 88	11
Hamilton v. *Rathbone*, 175 U. S. 414	11
Johannesburg Mfg. Co. v. *Michigan Central R. Co.*, 151 I. C. C. 61	14
L. & N. R. R. v. *United States*, 273 U. S. 321	10
Lake Superior & Mississippi R. R. Co. v. *United States*, 93 U. S. 442	10
M. E. Blatt Company, Petitioner, v. *United States*, 59 S. Ct. Rep. 186	9
Southern Pacific Company v. *United States*, 237 U. S. 202	10
Stone v. *United States*, 164 U. S. 380	9
The Land-Grant Railroad Case, 15 C. Cls. 126	10
Transcontinental Cases of 1922, 74 I. C. C. 48	13
United States v. *Central Pacific R. R. Co.*, 118 U. S. 235	10
United States v. *Esnault-Pelterie*, 299 U. S. 201	9
United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401	11
United States v. *Graham*, 110 U. S. 219	11
United States v. *Missouri Pacific Railroad Company*, 278 U. S. 269	11
United States v. *Northern Pacific Ry. Co.*, 256 U. S. 56	10

Page

United States v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655 11

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 11

United States v. *Wells*, 283 U. S. 102 9

TABLE OF STATUTES CITED.

Act of July 25, 1866, 14 Stat. 239 (Land Grant Act) 2, 8

Act of May 23, 1928, Part 1, 45 Stat. 722 (Amendment of Land Grant Act) 2, 8

Interstate Commerce Act, Sec. 1 (10), (11), (14), 41 Stat. 476 14

Transportation Act of 1920, Secs. 418-421, 41 Stat. 484 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

The petition of Southern Pacific Company respectfully shows to this Honorable Court:

A.

Summary and Short Statement of the Matter Involved.

This writ is sought to review the judgment of the Court of Claims dismissing the petition, in Case No. 42403, on its docket, entitled Southern Pacific Company, plaintiff, *vs.* The United States of America, defendant, entered on June 6, 1938, in which a motion for a new trial was filed by your

petitioner on July 19, 1938, and overruled by order of the Court of Claims, entered on November 14, 1938.

This case involves the right of the Government under the provisions of the Land Grant Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, in making settlements for railroad service performed during December, 1931, and January, 1932, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commercial tariff rates, than represented by the land-grant mileage proportion of the route via which the rates charged were exclusively applicable.

Is the Government entitled to a greater land-grant deduction from charges based on lawfully published, effective and applicable commercial tariff rates than represented by the proportion of land-grant mileage on the route of railroad via which the low tariff rates charged were exclusively applicable or greater than via which the shipments were transported?

The transportation of property of the United States by your petitioner Southern Pacific Company, plaintiff below, involved herein was between Portland or East Portland, Oregon, and San Francisco, California (Special Findings of Fact 2, R. 6).

Your petitioner, during the period of the shipments involved in this case, operated and now operates two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, in part owned by it and in part leased by it from its subsidiary, Central Pacific Railway Company, owner, both of which lines or routes were and are maintained and operated for freight, passenger and all classes of traffic (Special Findings of Fact 5, R. 7).

One of such routes, for convenience called the Siskiyou Route, was completed in December, 1887 (Special Findings of Fact 13, R. 12-13), and the other, for convenience called the Cascade Route, was completed in September, 1926 (Special Findings of Fact 14, R. 13-15), under necessary authority of the Interstate Commerce Commission issued in accordance with paragraph (18) of Section 1 of the Interstate Commerce Act, upon a finding by the Commission that the present and future public convenience and necessity required the construction of this line of railroad (*Finance Docket No. 2873*, 82 I. C. C. 185).

Since the completion of the construction of the lines of railroad constituting the Cascade Route in 1926, your petitioner has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou Route, serving the Sacramento and Shasta Valleys in California, and the Willamette, Umqua and Rogue River Valleys in Oregon, producing much tonnage of timber, agricultural products, livestock, etc. (Special Findings of Fact 13 (a) and 15, R. 12-13, 15-16), and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas (Special Findings of Fact 14 and 15, R. 13-15, 15-16).

Your petitioner has maintained the Siskiyou Route transporting a substantial and varied traffic and serving a large and important area. The Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines (Special Findings of Fact 15, R. 15-16).

258.13 miles of the Cascade Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is en-

titled to have its property or troops transported for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 6 (b), R. 7-8,).

The land-grant deduction proportion of such charges via the Cascade Route was and is 17.801 per cent between Portland, Oregon, and San Francisco, California, and 17.819 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 6 (c), R. 8).

663.16 miles of the Siskiyou Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property and troops transported for compensation 50 per cent of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 7 (b), R. 9).

The land-grant deduction proportion of such charges via the Siskiyou Route was and is 42.792 per cent between Portland, Oregon, and San Francisco, California, and 42.831 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 7 (c), R. 10).

On about 75 per cent of the total freight traffic transported by your petitioner on these routes between Oregon and California, the tariff rates are and have been since November, 1931, the same via both the Siskiyou and Cascade Routes, including the rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade Route have been since November, 1931, and are now lower than via the Siskiyou Route (Special Findings of Fact 20, R. 20-21). This was the result of decisions and rulings of the Interstate

Commerce Commission, an agency of Congress, in its administration of the Fourth Section of the Interstate Commerce Act as amended by the *Transportation Act of 1920*, Sections 418-421, 41 Stat. 484-488. The Interstate Commerce Commission refused to permit your petitioner to establish and maintain Fourth Section rates between the terminals, Portland or East Portland, Oregon, and San Francisco, California, for application via the Siskiyou Route, sufficiently low to enable it to compete for this 25 per cent water-borne freight traffic of coastwise steamship lines operating between Oregon and California ports. Because of the substantially lower cost of hauling freight over the Cascade line or route than over the Siskiyou line or route, on account of lesser grades, curvatures, operating difficulties and somewhat shorter distance on the Cascade Route, the Commission found that the lower Fourth Section rates to enable obtaining some of this traffic in competition with coastwise steamship lines would be reasonably compensatory under the amended Fourth Section and authorized their establishment and maintenance via the Cascade Route. The Commission, on its own motion, required your petitioner to readjust the rates so there would be no departures from the long-and-short-haul provision of the Fourth Section via the Siskiyou Route. Your petitioner established rates via the Siskiyou Route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates to, from, and between intermediate points on the Siskiyou Route, which were lower than the rates theretofore found to have been reasonable on the Siskiyou line or route by the Interstate Commerce Commission. These were the rates in effect via the Siskiyou Route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by your

petitioner via the Siskiyou Route. All as shown more in detail in the Special Findings of Fact of the Court of Claims (Special Findings of Fact, 16, 17, 20, R. 16-19, 20-21). Succinctly stated, the lower Fourth Section terminal rates exclusively applicable via the Cascade Route on the 25 per cent of traffic which was and is water-competitive, were compelled by an Act of respondent's Congress, administered by its authorized agent, the Interstate Commerce Commission. The particular shipments of respondent involved in this case were within the 25 per cent of the traffic on which the rates were lower via the Cascade Route than via the Sisikiyou Route (Special Findings of Fact 10, R. 10-11).

In October, 1931, prior to the above-described revision of rates via the Siskiyou and Cascade Routes, effective November 11, 1931, your petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of respondent in Washington, who was in charge of routing Government freight, of the proposed changes in rates via these Routes, the manner in which same would be applied, and advised such Coordinator of Traffic that either the Siskiyou Route or the Cascase Route could and would be used and that your petitioner would respect the Government's routing as to either line. Further, that the Fourth Section terminal rates via the Cascade Route less the land-grant deduction via that Route that would be available would make a less net charge to the Government than the use of the rates via the Siskiyou Route. Receipt of this communication was acknowledged by the Coordinator of Traffic in October, 1931 (Special Findings of Fact 19, R. 20).

There is no finding by the Court of Claims that your petitioner has ever failed or refused to adequately and satisfactorily transport property of the United States via the Siskiyou Route when requested so to do or that any dissatisfaction with the service afforded via the Siskiyou Route

has ever been expressed by any representative of respondent.

The shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments (Special Findings of Fact 4, R. 6). In other words, your petitioner was not requested or required to transport these shipments via the Siskiyou Route.

Your petitioner handled and charged for this unrouted traffic in the same manner as it was legally obligated to handle and charge for unrouted traffic of shippers generally. *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446. Your petitioner transported such unrouted shipments of respondent over the more economical and less costly operated part of the Cascade Route as compared with the Siskiyou Route and assessed charges against and billed respondent on the basis of the lowest net charges via any route of your petitioner between Portland or East Portland, Oregon, and San Francisco, California, which was on the basis of the lowest lawfully published and effective commercial tariff rates for the transportation of such shipments, restricted to and applicable only via the Cascade Route, less 50 per cent for the land-grant deduction proportions on the Cascade Route of 17.801 per cent for transportation between Portland, Oregon, and San Francisco, California, and 17.819 per cent for transportation between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 11, 12 (a) and 21, R. 11, 12, 21).

Respondent, through its General Accounting Office, made payments to your petitioner for the transportation of these shipments on the basis of the deduction from the total charges computed by applying the lawfully published and

effective commercial tariff rates for like transportation service to the public at large or private parties, restricted to and applicable only via the Cascade Route, between Portland or East Portland, Oregon, and San Francisco, California, 50 per cent for the higher land-grant deduction proportions of 42.792 per cent and 42.831 per cent, on the Siskiyou Route, respectively, applicable to commercial tariff charges to the public at large or private parties for transportation service between such points or terminals, via the Siskiyou Route, via which route such low tariff rates did not apply (Special Findings of Fact 12 (b), R. 12).

Your petitioner accepted such payments under protest and brought suit in the Court of Claims to test the right of respondent to enlarge your petitioner's obligations under the clear and unambiguous provisions of the Land-Grant Act contract and to recover the balance due (Special Findings of Fact 12 (c), R. 12). Its petition was dismissed by the Court of Claims and a review of such judgment is here sought.

B.

Reasons Relied on for the Allowance of the Writ.

1. Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> *And be it further enacted*, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said rail-

road, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)

Your petitioner has fully complied with all of its obligations to the Government under this Land-Grant Act contract as shown by comparison between its clear and unambiguous provisions and the Special Findings of Fact of the Court of Claims hereinbefore referred to, upon which, this Court has held that the case must be decided unaffected by any statement of fact, reasoning, or conclusion which may be found in the opinion of the lower court.

M. E. Blatt Company, Petitioner, v. *United States*, Opinion, United States Supreme Court, December 5, 1938, 59 S. Ct. Rep. 186;
Stone v. *United States*, 164 U. S. 380, 383;
Crocker v. *United States*, 240 U. S. 74, 78;
Brothers v. *United States*, 250 U. S. 88, 93;
United States v. *Wells*, 283 U. S. 102, 120;
United States v. *Esnault-Pelterie*, 299 U. S. 201, 206.

2. The respondent is only entitled to the land-grant proportion deduction from charges to the general public or private parties based on commercial tariff rates in effect and applicable via the route which includes the amount of

land-grant mileage for which the deduction is made. The Government is not entitled to compute deductions from such commercial charges based on a greater land-grant mileage proportion than exists on the route via which the commercial tariff rates charged on these unrouted shipments were exclusively applicable. In other words, the Government is not entitled to have a substantial railroad mileage constructed at great cost with private capital and unaided in any way by land grant or other Government assistance converted into land-grant mileage but this is in effect precisely what the judgment of the Court of Claims accomplishes.

The Land-Grant Railroad Cas., 15 C. Cls. 126, 139, 142;
Lake Superior & Mississippi R. R. Co. v. *United States*, 93 U. S. 442, 454, 455;
Southern Pacific Company v. *United States*, 237 U. S. 202;
L. & N. R. R. v. *United States*, 273 U. S. 321, 323.

3. The judgment of the Court of Claims imposes an obligation on your petitioner and vests a right in respondent, the Government, not assumed by your petitioner or conferred upon the Government under the clear and unambiguous provisions of the Land-Grant Act contract and would deprive your petitioner of its property without due process of law and without just compensation in contravention of the provisions of the Fifth Amendment.

United States v. *Central Pacific R. R. Co.*, 118 U. S. 235, 240, 241;
United States v. *Northern Pacific Ry. Co.*, 256 U. S. 56, 64;
Boeing Air Transport v. *Farley*, 75 F. (2d) 765, 767.

4. (a) The terms of your petitioner's obligation under the clear and unambiguous provisions of the Land-Grant Act contract have been expanded by construction in the opinion

of the Court of Claims, in arriving at its judgment, in contravention of the rule of law announced in decisions of this Honorable Court too numerous for complete citation here.

United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404;

United States v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277;

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;

Caminetti v. *United States*, 242 U. S. 470, 485;

Houghton v. *Payne*, 194 U. S. 88, 99, 100;

Hamilton v. *Rathbone*, 175 U. S. 414, 421;

United States v. *Graham*, 110 U. S. 219, 221;

Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

(b) In addition, the stated past administrative practice of respondent's accounting officers in making settlements and the alleged acquiescence by railroads, including your petitioner, therein, also the stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655, to which great weight is given in the opinion of the Court of Claims in expanding by construction the unambiguous terms of this Land-Grant Act obligation (R. 26, 27, 28, 29) are not mentioned in and are wholly unsupported by the Court's Special Findings of Fact.

5. The opinion and judgment of the Court of Claims changes the unambiguous written obligation of your petitioner set out in the Land-Grant Act by erroneously assuming and considering, without reference to or discussion of the provisions of this Land-Grant Act contract, that your petitioner was and is obligated thereunder not to use the more economical and less costly operated Cascade Route for through traffic, when not routed by the shipper or respondent via the Siskiyou Route (R. 28). Such is not the contract.

6. Certain statements of fact or conclusions in the opinion of the Court of Claims, to which it appears that considerable weight is given, either conflict with or are unsupported by the Special Findings of Fact of the Court.

(a) The statement in the opinion of the Court of Claims that for reasons stated in detail in the Findings, your petitioner secured authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route and reduce the rates over the Cascade Route (R. 25), conflicts with the Court's Special Findings of Fact (Special Findings of Fact 16 and 17, R. 16-20), which are, in substance, that your petitioner sought authority from the Interstate Commerce Commission to establish the low rates via the Siskiyou Route, which was denied by the Commission; that the Commission authorized such rates via the Cascade Route and denied all of your petitioner's applications for Fourth Section Relief on the Siskiyou Route. The law compelled the increases in rates via the Siskiyou Route to remove prohibited Fourth Section departures. Your petitioner did not seek or secure authority to increase the rates over the Siskiyou Route as stated in the opinion of the court but this was compelled by order of the Interstate Commerce Commission without request by your petitioner.

(b) The reference in the opinion of the court to the rates via the Siskiyou Route as excessive rates in line five (R. 29), conflicts with the Court's Special Findings of Fact 17, R. 19-20, which is that your petitioner established and maintains rates via the Siskiyou Route lower than rates which have been found to be reasonable for application via the Siskiyou Route by the Interstate Commerce Commission. Therefore, such rates could not be excessive as stated in the opinion of the court. In addition, if at any time the Government thinks that the rates maintained by your peti-

tioner via the Siskiyou Route are not reasonable, it has the same right as any other shipper to apply to the Interstate Commerce Commission for readjustment of such rates. Sec. 1, (4); (5), (6), and Sec. 13, Interstate Commerce Act, 41 Stat. 475, 36 Stat. 550.

(c) The conclusion in the opinion of the Court (R. 28) is that while the land-grant portions of the Siskiyou Route between Springfield Junction and Black Butte via Ashland, and between Tehama and Roseville, have not been abandoned and have been kept in good repair by your petitioner and are open for through traffic between San Francisco, California, and Portland, Oregon, the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare instances. In view of the judgment of the Court of Claims, the implication of this conclusion must be that your petitioner is responsible and is blamed for this difference in rates between the Siskiyou and Cascade Routes. (The difference applies on only 25 per cent of the traffic as shown in Special Findings of Fact 20, R. 20-21). Such implication conflicts with the Court's Special Findings of Fact (Special Findings of Fact 16 and 17, R. 16-20) which show that this difference in rates was caused by an Act of Congress, administered by its agent, the Interstate Commerce Commission, and was not sought by your petitioner. *Transportation Act of 1920,* by which the Fourth Section of the Interstate Commerce Act was amended, Secs. 418-421, 41 Stat. 484-488; *Transcontinental Cases of 1922,* 74 I. C. C. 48, 70, 71, in which the 1920 amendment was interpreted by the Commission.

(d) The reference to train service over the Cascade and Siskiyou Routes, in the opinion of of the Court (R. 28-29), to which considerable weight appears to be given, is imma-

terial under the Special Findings of Fact of the Court. The Findings referred to in the preceding summary and statement, in part, are:

The Siskiyou and Cascade Routes are separate and distinct routes serving and necessary to different territories, both of which are maintained and operated for freight, passenger, and all classes of traffic by your petitioner. There is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for anyone else routing shipments or requesting service via the Siskiyou Route. It is immaterial what the comparative train service via the Siskiyou Route may have been at the time of these shipments. There is no Finding of any demand or request for any different character of freight train service on the Siskiyou Route by anyone, including the Government. The shipments here involved were unrouted and no service via the Siskiyou Route, to use the language of the Land-Grant Act contract, was required by the Government of the United States. There has been no breach by your petitioner of its obligations under this contract. In addition, if at any time the Government should think that the train service of your petitioner via the Siskiyou Route is not adequate and reasonable, it has the same right as any other shipper to apply to the Interstate Commerce Commission for the determination of the facts and an appropriate order, over which matters the Commission has jurisdiction. Sec. 1, (10), (11), (14), Interstate Commerce Act, 41 Stat. 476.

Johannesburg Mfg. Co. v. *Michigan Central R. Co.*, 151 I. C. C. 61.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, com-

manding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 42403, Southern Pacific Company, plaintiff, *vs.* The United States, defendant, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

SOUTHERN PACIFIC COMPANY,
By JAMES R. BELL,
Counsel for Petitioner.

Dated, Washington, D. C., January 24, 1939.

INDEX TO BRIEF.

	Page
I. Opinion of the court below	1
II. Jurisdiction	1
III. Statement of the case	2
IV. Specification of errors intended to be urged	2
V. Argument	3
(A) The Court of Claims erred in not deciding upon its special findings of fact that your petitioner has fully complied with its obligations to the Government under the Land-Grant Act Contract and is entitled to recover	3
(B) The Court of Claims erred in expanding by construction the clear and unambiguous terms of your petitioner's obligations to the Government under the Land-Grant Contract	12
(C) The Court of Claims erred in considering and attaching weight in its opinion in arriving at its judgment, to alleged matters or statements of fact or conclusions which are not mentioned in, are wholly unsupported by, and in part conflict with, the court's special findings of fact	14
Conclusion	16
Appendix	17

TABLE OF CASES CITED.

Arizona Grocery Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370	9
Brothers v. *United States*, 250 U. S. 88	14
Caminetti v. *United States*, 242 U. S. 470	13
3 Comp. Gen. 267	15
15 Comp. Gen. 614	15
21 Comp. Dec. 238	15
24 Comp. Dec. 193	15

Page

Crocker v. *United States*, 240 U. S. 74 14
Doggett v. *Railroad Company*, 99 U. S. 72 13
Finance Docket 2873, 82 I. C. C. 185 8
Houghton v. *Payne*, 194 U. S. 88 13
Hamilton v. *Rathbone* 175 U. S. 414 13
Johannesburg Mfg. Co. v. *Michigan Central R. Co.*, 151 I. C. C. 61 10
M. E. Blatt Company, Petitioner, v. *United States*, 59 S. Ct. Rep. 186 14
Stone v. *United States*, 164 U. S. 380 14
Transcontinental Cases of 1922, 74 I. C. C. 48 9
United States v. *Esnault-Pelterie*, 299 U. S. 201 14
United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401 12
United States v. *Graham*, 110 U. S. 219 13
United States v. *Missouri Pacific Railroad Company*, 278 U. S. 269 13
United States v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655 15
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 13
United States v. *Wells*, 283 U. S. 102 14

Table of Statutes Cited.

Act of July 25, 1866, Sec. 5, 14 Stat. 239, Chap. 242 (Land Grant Act) 2, 4, 5
Act of May 23, 1928, Part 1, 43 Stat. 722, Chap. 720 (Amendment of Land Grant Act) 2, 5
Transportation Act of 1920, Secs. 418-421, 41 Stat. 484-488 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court of Claims in this case has not been reported but as required is a part of the record filed herein.

II.

Jurisdiction.

The judgment of the Court of Claims in this case was rendered on June 6, 1938. A motion for a new trial was filed by plaintiff, your petitioner, on July 19, 1938 (Rule 91 of the Rules of the Court of Claims of the United States, effective March 10, 1936). The Court of Claims entered

an order on November 14, 1938, overruling plaintiff's motion for a new trial (R. 29).

Your petitioner invokes the judgment of this Court under Section 3 (b) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936, 939).

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the question presented, based entirely upon the Special Findings of Fact of the Court of Claims, with references to such by number and with appropriate page references to their place in the record, is made in the petition for writ of certiorari. To avoid repetition, your petitioner respectfully asks that such statement of the petition be considered a part of this brief. Further discussion of the facts is made hereinafter in the argument.

IV.

Specification of Errors Intended to be Urged.

The Court of Claims erred:

1. In deciding upon its Special Findings of Fact, as a conclusion of law, that your petitioner is not entitled to recover and in dismissing its petition.

2. In not deciding, based upon its Special Findings of Fact, that your petitioner has fully complied with its obligations to the Government on the Siskiyou Route, under the provisions of the Land-Grant Act of July 25, 1866, as amended by the Act of May 23, 1928, and is entitled to recover.

3. In expanding by construction the clear and unambiguous terms of your petitioner's obligations to the Govern-

ment under the Land-Grant Act contract on the Siskiyou Route.

4. In considering and attaching weight in its opinion in arriving at its judgment, to alleged matters or statements of fact or conclusions which are not mentioned in, are wholly unsupported by and in part conflict with the court's Special Findings of Fact.

V.

Argument.

It is thought that the statement of the matter involved, based on the Special Findings of Fact of the lower court, and the reasons relied on for the allowance of the writ, including citations of authorities, in the petition, are sufficiently comprehensive from standpoint of fact and law to sustain the assignments of error here made and to justify the issuance of the writ sought. In further support of such assignments of error, it may be informative to briefly analyze the opinion of the Court of Claims in the light of your petitioner's land-grant contractual obligations to the Government and the Special Findings of Fact of the lower court.

A.

The Court of Claims Erred in Not Deciding Upon Its Special Findings of Fact That Your Petitioner Has Fully Complied With Its Obligations to the Government Under the Land-Grant Act Contract and is Entitled to Recover.

Leaving aside for the present, the question of the erroneous expansion of the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract, and the consideration of matters in the opinion of the lower court, which are unsupported by or in conflict

with the court's Special Findings of Fact. Although not expressly so stated, the court by necessary implication concluded that your petitioner has breached its Land-Grant Act contract with the Government respecting the Siskiyou Route and that this entitled the Government, in making settlements with your petitioner, to the greater Siskiyou Route land-grant mileage deductions from charges based on the low Fourth Section commercial tariff rates on these shipments not applicable via the Siskiyou Route but applicable only to shipments via the Cascade Route which has less land-grant mileage.

This conclusion is arrived in the opinion of the court without any mention or discussion whatever of the provisions of Section 5 of the Land-Grant Act of July 25, 1866, set out in the appendix hereto, covering the obligations of your petitioner and the rights of respondent.

The reasons stated in the opinion of the Court of Claims appear to be:

(a) That your petitioner has practically abandoned through traffic on the Siskiyou Route (R. 28).

(b) That your petitioner now transports through traffic for the general public on the Cascade Route which, before the completion of the Cascade Route, it transported over the Siskiyou Route (R. 28).

(c) The difference in the rates on 25 per cent of the traffic between the two routes, the court stating that the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare circumstances (R. 28-29).

(d) That there could be no inducement to a shipper to use the route via the old land-grant-line (the Siskiyou Route), in view of excessive rates and your petitioner's

general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route (R. 29).

In the contract between the parties, being Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant-line, your petitioner's obligations and the corresponding rights of the Government thereunder are clearly set out. Your petitioner is obligated:

(1) To keep said railroad and telegraph in repair and use, and transport the mails thereon and transmit dispatches by said telegraph line for the Government, *when required so to do by any department thereof;*

(2) To give the Government preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service;

(3) That said railroad shall be and remain a public highway for the use of the Government of the United States and (as amended by the Act of May 23, 1928) charges for transportation of property or troops of the United States to be 50 per cent less for the land-grant mileage proportion of the route than charges to the general public based on commercial rates for transportation over said railroad;

(4) That property or troops of the United States shall be transported over said railroad (the Siskiyou Route) *when so required by the Government of the United States.*

There is no Finding of Fact in the Special Findings of Fact of the Court of Claims that your petitioner has, in any respect, failed to fully comply with its obligations under this contract. This case involves the transportation of

freight and there is no question presented respecting the transportation of troops or the mails upon such railroad or the transmission of despatches by telegraph line, when required so to do by any department of the United States. The contract clearly provides that petitioner shall transport property or troops of the United States over the land-grant Siskiyou Route, *when so required by the Government of the United States.* There is nothing in the Special Findings of Fact of the lower court showing that your petitioner has ever failed or refused to comply satisfactorily with this obligation to transport property or troops of the United States over the Siskiyou Route, *when so required by the Government,* or has failed in any other respect to fulfill its obligations. There is no Finding in the Special Findings of Fact of the lower court that the adequacy of your petitioner's freight train service via the Siskiyou Route has ever been questioned by any representative of the Government or department of the Government having any connection with transportation of freight of the Government or by the accounting officers of the Government. Not only do such Findings not show that your petitioner has ever failed or refused to transport property or troops of the United States adequately and satisfactorily via the Siskiyou Route but there is no Finding that any request or requirement by the Government of the United States in any instances or particular instance has been made that your petitioner do so. *This is the requirement of the contract.*

In the instant case, the shipments in question were unrouted by the Government as to any particular route of your petitioner. (Special Findings of Fact 4, R. 6). If the Government had routed such shipments via the Siskiyou Route, this would have been a requirement, as provided in the contract, that the shipments be so transported by your petitioner. The Special Findings of Fact of the lower court show that your petitioner, complying with its duty under the

general law, *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446, gave the Government the benefit of the lowest available net charge on each of such shipments between Portland or East Portland, Oregon, and San Francisco, California. These lowest net charges were based upon the applicable commercial lower Fourth Section rates restricted to the Cascade Route, less the appropriate land-grant deductions represented by the land-grant mileage on that route to which such rates were restricted and only applied (Special Findings of Fact 11, 12 (a), R. 11, 12).

So far as concerns the reasons stated in the opinion of the Court hereinbefore set out as (a) and (b), that your petitioner has practically abandoned through traffic on the Siskiyou Route and transports through traffic for the general public on the more economical Cascade Route, which it previously transported over the Siskiyou Route, the attention of the Court is called to the clear and unambiguous provisions of this Land-Grant Act contract. Your petitioner is obligated to keep the railroad and telegraph in repair and use and to transport property or troops of the United States thereover when so required by the Government of the United States. It is not obligated to the Government to transport any particular amount of through freight traffic for the general public via the Siskiyou Route and the law does not require it to do so unless the shipper routes such traffic via the Siskiyou Route.

Your petitioner has not abandoned the Siskiyou Route for traffic of any description. The Court of Claims finds in its opinion that the Siskiyou Route has not been abandoned by your petitioner and has been kept in good repair and is open for through transportation between San Francisco and Portland (R. 28). This is fully supported by the Special Findings of Fact. Special Findings of Fact 5 (R. 7), is that your petitioner has maintained and operated both the Siskiyou and Cascade Lines or Routes for freight, passenger and all classes of traffic. Through traffic is a class of

traffic. Special Findings of Fact 15 (R. 15-16), is that your petitioner has two complete lines of railroad or routes, one the Siskiyou Route, serving the valleys and areas described, producing much tonnage of timber, agricultural products, livestock, etc., and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. It is also found that your petitioner has maintained the Siskiyou Route, transporting a substantial and varied traffic and serving a large and important area, and it is further found that the Siskiyou Route and the Cascade Route are two separate routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines.

Completion of the construction of the Cascade Route was found by the Interstate Commerce Commission to be required by the present and future public convenience and necessity and such construction was authorized by the Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act in *Finance Docket No. 2873*, 82 I. C. C. 185.

There has been no abandonment in any respect of the Siskiyou Route or any part thereof. This would require authority of the Interstate Commerce Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act requiring a certificate based on the finding that the present or future public convenience and necessity permit of such abandonment, which, in view of the Special Findings of Fact herein, obviously could not be obtained.

Referring to the third reason appearing in the opinion of the lower court, hereinbefore shown as paragraph (c), respecting the difference in the rates between the two routes

on 25 per cent of the traffic (Special Findings of Fact 20, R. 20-21): Your petitioner has not forced shippers, including the United States, to use the Cascade Route. Your petitioner sought but was not permitted to establish rates via the Siskiyou Route sufficiently low to enable it to participate in the traffic susceptible of water transportation by coastwise lines, via the Siskiyou Route. Shippers would not ship via the Siskiyou Route at the minimum rates authorized by the Interstate Commerce Commission. The lower Fourth Section terminal rates were authorized by the Interstate Commerce Commission for application via the Cascade Route because of the lower cost of operation via that route (Special Findings of Fact 16, 17, 20, R. 16-19, 19-20, 20-21). Manifestly it cannot be held that your petitioner has breached its Land-Grant contract with the Government by not establishing rates sufficiently low via the Siskiyou Route to obtain traffic from shippers for transportation via this route in competition with coastwise steamship lines when the laws of respondent, the United States, the other party to the contract, prevented it from so doing as shown in the Special Findings of Fact above referred to. This difference in rates between the two routes resulted from decisions of the Interstate Commerce Commission in the administration of the *Fourth Section* of the *Interstate Commerce Act* as amended by the *Transportation Act of 1920*, Secs. 418-421, 41 Stat. 484-488, interpreted by the Interstate Commerce Commission in *Transcontinental Cases of 1922*, 74 I. C. C. 48, 70, 71. The Transportation Act evinced an enlarged and different policy upon the part of Congress. In passing upon the reasonableness and lawfulness of rates for the future, the Interstate Commerce Commission speaks as the Legislature and its pronouncement has the force of a statute. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 385, 386.

The fourth reason in the opinion of the Court (d) is that there could be no inducement to a shipper to use the route via the old land-grant line (the Siskiyou Route) in view of the excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route. This reference to excessive rates, as will hereinafter be pointed out, directly conflicts with the Court's Special Findings of Fact. This reference to train service is mentioned in the petition. Under the Special Findings of Fact of the Court that the Siskiyou Route is maintained and operated by your petitioner for freight, passenger and all classes of traffic, the lower court stating in its opinion that your petitioner has not abandoned the Siskiyou Route but has kept same in good repair and open for through traffic, it is immaterial what the comparative train service may have been at the time of these shipments. These shipments, as shown, were unrouted by the Government. There is no Finding that the Government requested your petitioner to transport these shipments via the Siskiyou Route, which is the provision of the Land-Grant contract, and there is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for any shipper routing shipments or requesting service via this route. The Interstate Commerce Commission has jurisdiction under the provisions of the Interstate Commerce Act, 41 Stat. 476, to require adequate and satisfactory train service via any route upon the complaint of shippers, including the Government. *Johannesburg Mfg. Co.* v. *Michigan Central R. Co.*, 151 I. C. C. 61.

As to the inducement to a shipper to use the route, referred to in the Court's opinion, it is submitted that on the 25 per cent of the traffic which is water-competitive your petitioner did its best to induce shippers to use the Siski-

you Route by undertaking to obtain from the Interstate Commerce Commission the necessary authority under the *Fourth Section* of the *Interstate Commerce Act*, as amended by the *Transportation Act of 1920*, to establish rates sufficiently low over the Siskiyou Route, including the rates between Portland or East Portland, Oregon, and San Francisco, California, to obtain some of this traffic from shippers in competition with coastwise steamship lines for transportation via the Siskiyou Route. The laws of the United States prevented this and there was and is nothing that your petitioner can do to induce shippers to use the Siskiyou Route. Furthermore, as seen from an examination of the clear and unambiguous provisions of the Land-Grant Act contract, such imposes no obligation on your petitioner not to use the more economical and less costly operated Cascade Route for through traffic of the general public when such is not routed via the Siskiyou Route by the shipper. Under the provisions of *Section 15(8)* of the *Interstate Commerce Act* shippers have the right to determine and designate over which line or route their traffic shall be transported and railroads are obligated to observe such routing instructions of the shipper. There is no Finding in the Special Findings of Fact that shippers are not routing their traffic via the Cascade Route and there is no Finding of any demand, request, or reason for any different character of freight train service via the Siskiyou Route than afforded by your petitioner.

Prior to the revision of rates via the Cascade and Siskiyou Routes resulting from the decision of the Interstate Commerce Commission, your petitioner gave written notice to the Government that either the Siskiyou or Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line (Special Findings of Fact 19, R. 20).

B.

The Court of Claims Erred in Expanding by Construction the Clear and Unambiguous Terms of Your Petitioner's Obligations to the Government Under the Land-Grant Act Contract.

In the opinion of the Court of Claims (R. 26, 27, 29), controlling weight in arriving at its decision is given to what is stated to have been the past administrative method or construction of respondent's accounting officers in making like settlements with land-grant railroads, thus expanding the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract. This is the effect of the judgment although there is no mention of the language of the Land-Grant Act in the opinion of the Court. As will be hereinafter pointed out, there is no mention in the Special Findings of Fact of the court of any method of settlement employed by respondent's accounting officers in the past.

It is not allowable to interpret what has no need of interpretation and long usage is of no avail against a plain statute.

In *United States* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404, this Court held:

> The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* (Italics ours.) When considering another question arising under a like provision in a land grant Act, this Court said: "It might be very convenient for the Government to have more

rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454.

In *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277, this Court said:

> We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

In *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, this settled rule is announced:

> Indeed the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity.

See also

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;
Caminetti v. *United States*, 242 U. S. 470, 485;
Houghton v. *Payne*, 194 U. S. 88, 99, 100;
United States v. *Graham*, 110 U. S. 219, 221;
Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

C.

The Court of Claims Erred in Considering and Attaching Weight in Its Opinion in Arriving at Its Judgment, to Alleged Matters or Statements of Fact or Conclusions Which Are Not Mentioned In, Are Wholly Unsupported By, and in Part Conflict With, the Court's Special Findings of Fact.

The correctness of the judgment of the Court of Claims depends upon its Special Findings of Fact, made a part thereof, without regard to statements of fact, reasoning or conclusions that may be found in its opinion.

In *M. E. Blatt Company, Petitioner,* v. *United States,* Opinion, United States Supreme Court, December 5, 1938; 59 S. Ct. Rep. 186, 189, in reviewing a judgment of the Court of Claims, this Court said:

> Concretely, the question presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. *And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.* (Italics ours.)

The same ruling is announced in the following decisions:

Stone v. *United States,* 164 U. S. 380, 383;
Crocker v. *United States,* 240 U. S. 74, 78;
Brothers v. *United States,* 250 U. S. 88, 93;
United States v. *Wells,* 283 U. S. 102, 120;
United States v. *Esnault-Pelterie,* 299 U. S. 201, 206.

Great weight appears to be given in the opinion of the Court of Claims to the following statements of fact or conclusions, which are not mentioned in and are wholly unsupported by the court's Special Findings of Fact.

(a) The past administrative method, practice or construction of respondent's accounting officers in making settlements with land-grant railroads (R. 26, 27, 29).

(b) The stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655 (R. 26-27), which, for obvious reasons, would not have been competent had such been offered in evidence in this case. The report of the decision shows that your petitioner was not a party to that case or to such stipulations.

(Even if the alleged past method of settlement of respondent's accounting officers and the stipulations of the parties in the *Northern Pacific* case were competent, had been included in the Findings and could be properly considered, such would be inapplicable here. As shown by the Special Findings of Fact and the Land-Grant contract, there has been no abandonment of any part of the Siskiyou Route and no substitution in whole or in part for the longer aided and original line (The Siskiyou Route). See discussion in the opinion (R. 26).)

(c) The acquiescence by land-grant railroads, including your petitioner, in such administrative construction of respondent's accounting officers (R. 26, 27).

(See 21 Comp. Dec. 238, 24 Comp. Dec. 193, 3 Comp. Gen. 267, 15 Comp. Gen. 614, where the facts presented were different from the facts of this case and consistent with those stated in the opinion, but where the railroads protested instead of acquiescing as stated in the opinion.)

The following statements of fact or conclusions in the opinion of the Court of Claims, to which great weight appears to be attached, conflict with the court's Special Findings of Fact.

(a) That your petitioner secured or sought authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route (R. 25). This has

been discussed hereinbefore. The statement conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21). Your petitioner sought authority to reduce the rates via the Siskiyou Route under the Fourth Section of the Interstate Commerce Act sufficiently to enable competition with coastwise lines, which the Commission refused to grant.

(b) That the rates established and maintained by your petitioner over the Siskiyou Route were or are excessive rates (fifth line, R. 29). This has been discussed hereinbefore. The statement directly conflicts with Special Findings of Fact 17 (R. 19). The rates established and maintained via and on the Siskiyou Route were and are lower than found to be reasonable on that line by the Interstate Commerce Commission.

(c) By implication, that your petitioner forced shippers, including the United States, to use the Cascade Route instead of the Siskiyou Route by restricting the application of the lower scale of rates to the Cascade Route (R. 28-29). This has also been discussed hereinbefore. The laws of respondent, administered by the Interstate Commerce Commission, prevented the establishment of such rates via the Siskiyou Route and compelled their restriction to the Cascade Route. The statement in the opinion conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21).

Conclusion.

For the reasons set out herein and in the petition, your petitioner respectfully asks that the writ of certiorari prayed for be granted by this Honorable Court.

Respectfully submitted,

JAMES R. BELL,
Counsel for Southern Pacific Company, Petitioner.

Dated Washington, D. C., January 24, 1939.

APPENDIX.

Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 613.

SOUTHERN PACIFIC COMPANY, *Petitioner*,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR THE PETITIONER.

JAMES R. BELL,
Counsel for Petitioner.

INDEX.

	Page
I. Opinion of the Court Below	1
II. Jurisdiction	1
III. Question Presented	2
IV. Statutes Involved	3
V. Statement of the Case	4
VI. Specification of Errors to be Urged	10
VII. Argument	11
A. The Court of Claims Erred in Not Deciding Upon Its Special Findings of Fact that Your Petitioner Has Fully Complied With Its Obligations to the Government Under the Land-Grant Act Contract and is Entitled to Recover	12
B. The Court of Claims Erred in Expanding by Construction the Clear and Unambiguous Terms of Your Petitioner's Obligations to the Government Under the Land-Grant Act Contract	20
The Provisions of the Statute are Clear and Unambiguous and the Government is Bound by the Provisions of the Contract Set Out Therein	20
The Applicable and Well-Established Rule of Law Respecting Statutory Construction is that it is Not Allowable to Interpret What Has No Need of Interpretation. Long Usage is of no Avail Against a Plain Statute.	21
C. The Court of Claims Erred in Considering and Attaching Weight in Its Opinion in Arriving at Its Judgment, to Alleged Matters or Statements of Fact or Conclusions Which Are Not Mentioned in, Are Wholly Unsupported by, and in Part Conflict With, the Court's Special Findings of Fact.	23

Page

D. The Judgment of the Court of Claims Imposes an Obligation on Your Petitioner and Vests a Right in the Government Not Assumed by Your Petitioner or Conferred Upon the Government Under the Clear and Unambiguous Provisions of the Land-Grant Act Contract, and, if Enforced, Would Deprive Your Petitioner of Its Property Without Due Process of Law in Violation of the Fifth Amendment. 26

E. Erroneous Contentions of Respondent, Found Also in Substance in the Opinion of the Court of Claims. 28

The Decision of the Circuit Court of Appeals of the Eighth Circuit in the Northern Pacific Case is Clearly Distinguishable on the Facts. Further, the Circuit Court of Appeals Erred in the Rule Announced Respecting Weight to be Given Administrative Construction Without Qualification Respecting Ambiguity.. 29

Rulings of Respondent's Accounting Officers Distinguished On the Facts Presented. Further, Railroads, Including Petitioner, Have Not Acquiesced. 37

Rulings of Respondent's Accounting Officers Contradict Its Contention Here. 43

Respondent's Contention Respecting Comparative Rates via the Siskiyou and Cascade Routes on the Water-Competitive 25 Per Cent of the Traffic is Clearly Erroneous. 44

Certain Decisions Cited by Respondent Have No Application to the Facts of this Case. 50

Conclusion 51

Appendix A 53

TABLE OF CASES CITED.

Page

Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370 ..... 17, 31
Boeing Air Transport v. Farley, 75 F. (2d) 765 ..... 27, 28
Brothers v. United States, 250 U. S. 88 23
Brownyard v. Union P. R. Co., 148 I. C. C. 444 ..... 9, 15
Burke v. S. P. R. R. Co., 234 U. S. 669 21
Caminetti v. United States, 242 U. S. 470 23
Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States, 217 U. S. 180 50
Chippewa Indians of Minnesota v. United States, 59 S. Ct. 313 50
5 Comp. Dec. 364 38
7 Comp. 224 43
8 Comp. 474 44
17 Comp. Dec. 633 ..... 24, 39
21 Comp. Dec. 238 ..... 24, 39
24 Comp. Dec. 193 ..... 24, 40
7 Comp. Gen. 267 ..... 24, 40
10 Comp. Gen. 552 ..... 24, 41
15 Comp. Gen. 614 ..... 24, 42
3 Dig. Dec. 2d Comp. 299 24
Crocker v. United States, 240 U. S. 74 23
Doggett v. Railroad Company, 99 U. S. 72 23
Finance Docket 2873, 82 I. C. C. 185 ..... 5, 16
Fourth Section Application No. 13457 et al., 165 I. C. C. 373 ..... 47, 48
Fourth Section Application No. 13457 et al., 190 I. C. C. 273 ..... 47, 48
Hamilton v. Rathbone, 175 U. S. 414 22
Houghton v. Payne, 194 U. S. 88 23
Helvering v. St. Louis Southwestern Ry. Co. 84 Fed. (2d) 857 35
Helvering v. Northwestern Nat. Bank & Trust Co., 89 Fed. (2d) 553 36
Johannesburg Mfg. Co. v. Michigan Central R. Co., 151 I. C. C. 61 18
Johnson v. Southern Pacific Company, 117 Fed. 462 36
L. & N. R. R. v. United States, 273 U. S. 321 3
Lake Superior & Mississippi R. R. Co. v. United States, 93 U. S. 442 ..... 3, 20
M. E. Blatt Company, Petitioner, v. United States, 59 S. Ct. 186 23

Page

Minnesota Tea Co. v. Commissioner of Internal Revenue, 76 Fed. (2d) 797 36
Norton Iron Works v. Standard Slag Co. 13 F. (2d) 622 35
Southern Pacific Company v. United States, 237 U. S. 202 3
Southern Pacific Company v. United States, 272 U. S. 445 50
Stone v. United States, 164 U. S. 380 23
The Land-Grant Railroad Case, 15 C. Cls. 126 3
Transcontinental Cases of 1922, 74 I. C. C. 48 17
Union Pacific R. Co. v. U. S., 104 U. S. 662 21
United States v. Central Pacific R. R. Co., 118 U. S. 235 ..... 21, 26, 34, 38
United States v. Esnault-Pelterie, 299 U. S. 201 23
United States v. Galveston, Harrisburg & San Antonio Ry. Co., 279 U. S. 401 ..... 21, 22
United States v. Graham, 110 U. S. 219 23
United States v. Kansas Pacific R. Co. 99, U. S. 455 ..33, 38
United States v. Missouri Pacific R. R. Co., 278 U. S. 269 22
United States v. Northern Pacific Ry. Co., 256 U. S. 51 ..... 21, 27
United States v. Northern Pacific Ry. Co., 30 F. (2d) 655 ..... 21, 24, 28, 29, 31, 32
United States v. Northern Pacific Ry. Co., 32 F. (2d) 698 ..... 21, 28, 32, 33, 34
United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 22
United States v. Wells, 283 U. S. 102 23
W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 82 Fed. (2d) 94 35
Walker v. United States, 83 Fed. (2d) 103 36
Webber v. St. Paul City Ry. Co., 97 Fed. 140 37

TABLES OF STATUTES CITED.

Act of July 25, 1866, Sec. 5, 14 Stat. 239, Chap. 242 (Land Grant Act) 2, 3, 13, 20, 53
Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720 (Amendment of Land Grant Act) 2, 3, 13, 20, 53
Interstate Commerce Act, Sec. 1 (10), (11), (14), 41 Stat. 476 ..... 17, 18, 19, 30
Transportation Act of 1920, Secs. 418-421, 41 Stat. 484-488 ..... 7, 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 613.

SOUTHERN PACIFIC COMPANY, *Petitioner*,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR THE PETITIONER.

I.

Opinion of the Court Below.

The opinion of the Court of Claims in this case has not been reported but as required is a part of the record filed herein (R. 5-29).

II.

Jurisdiction.

The judgment of the Court of Claims in this case was rendered on June 6, 1938. A motion for a new trial was filed by plaintiff, your petitioner, on July 19, 1938, and was overruled by order of the Court of Claims entered on No-

vember 14, 1938 (R. 29-30). The petition for writ of certiorari was filed herein on January 24, 1939 (R. 30) and was granted by order of this Court entered on March 6, 1939.

The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936, 939).

III.

Question Presented.

This case involves the right of the Government under the provisions of the Land-Grant Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, in making settlements for railroad service performed during December, 1931, and January, 1932, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commercial tariff rates, than represented by the land-grant mileage proportion of the route via which the rate charged were exclusively applicable.

Is the Government entitled to a greater land-grant deduction from charges based on lawfully published, effective and applicable commercial tariff rates than represented by the proportion of the land-grant mileage on the route of railroad via which the low tariff rates charged were exclusively applicable or greater than via which the shipments were transported?

The position of your petitioner is that the respondent is only entitled to the land-grant proportion deduction from charges to the general public or private parties based on commercial tariff rates in effect and applicable via the route which includes the amount of land-grant mileage for which the deduction is made. The Government is not entitled to compute deductions from such commercial charges based on a greater land-grant mileage proportion than exists on the route via which the commercial tariff rates

charged on these unrouted shipments were exclusively applicable. In other words, the Government is not entitled to have a substantial railroad mileage constructed at great cost with private capital and unaided in any way by land grant or other Government assistance converted into land-grant mileage but this is in effect precisely what the judgment of the Court of Claims accomplishes.

The Land-Grant Railroad Case, 15 C. Cls. 126, 139, 142;
Lake Superior & Mississippi R. R. Co. v. *United States*, 93 U. S. 442, 454, 455;
Southern Pacific Company v. *United States*, 237 U. S. 202;
L. & N. R. R. v. *United States*, 273 U. S. 321, 323.

IV.

Statutes Involved.

Although other Acts are cited in the appendix of the brief of the United States in opposition to the petition for a writ of certiorari, the only statutes involved in this case under the Special Findings of Fact and opinion of the Court of Claims are Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, and the Amendment by the Act of May 23, 1928, 45 Stat. 722, Chap. 720. These provisions of law are hereinafter set out as Appendix A to this brief. As shown in special findings of fact 7(b), R. 9, for the land-grant mileage on the line of railroad between East Portland, Oregon, and Roseville, California, via the Siskiyou Route, plaintiff, your petitioner, is and was obligated to transport property and troops of the United States for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service. This Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line,

covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented. The effect of the Act of May 23, 1928, was as found by the lower Court to make the land-grant mileage on the Siskiyou Route 50 per cent. It is consequently unnecessary to consider the other Acts referred to in this Amendment of May 23, 1928.

The Act of July 1, 1862, 12 Stat. 489, 493, Chap. 120, set out in the appendix at page 13 of the previously mentioned brief of the United States, referring to petitioner's line from San Francisco to Roseville, California, (which was bond-aided, since paid off and not land-grant,) has no materiality whatever in the consideration of the issue presented in this case.

The Act of June 7, 1924, Chap. 291, Title I, 43 Stat. 477, 486, (U. S. C. Title 10, Sec. 1375), referred to at pages 15 and 16 of the appendix to the previously mentioned brief for the United States, is a War Department Appropriations Act. It merely provides for payment of 50 per centum of the full amount of compensation based on tariff rates for transportation of property or troops of the United States over land-grant mileage. The provisions of this Act differ in no way from the Special Finding of Fact of the Court of Claims 7(b), (R. 9). This statute is not involved in this case. The shipments, as shown in Special Finding of Fact 2 (R. 6), were made by the Department of Commerce as well as by the War Department.

V.

Statement of the Case.

This suit was brought in the Court of Claims to obtain a decision on the question of the legal right of the Government, in making settlements with your petitioner, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commer-

cial tariff rates, than represented by the land-grant mileage proportion of the route via which the rates charged were exclusively applicable.

The transportation of property of the United States by your petitioner Southern Pacific Company, plaintiff below, involved herein was between Portland or East Portland, Oregon, and San Francisco, California (Special Findings of Fact 2, R. 6).

Your petitioner, during the period of the shipments involved in this case, operated and now operates two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, in part owned by it and in part leased by it from its subsidiary, Central Pacific Railway Company, owner, both of which lines or routes were and are maintained and operated for freight, passenger and all classes of traffic (Special Findings of Fact 5, R. 7).

One of such routes, for convenience called the Siskiyou Route, was completed in December, 1887 (Special Findings of Fact 13, R. 12-13), and the other, for convenience called the Cascade Route, was completed in September, 1926 (Special Findings of Fact 14, R. 13-15), under necessary authority of the Interstate Commerce Commission issued in accordance with paragraph (18) of Section 1 of the Interstate Commerce Act, upon a finding by the Commission that the present and future public convenience and necessity required the construction of this line of railroad (*Finance Docket No. 2873*, 82 I. C. C. 185).

Since the completion of the construction of the lines of railroad constituting the Cascade Route in 1926, your petitioner has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou Route, serving the Sacramento and Shasta Valleys in California, and the Willamette, Umqua and Rogue River Valleys in Oregon, producing much tonnage of timber, agricultural products, livestock, etc. (Special Findings of Fact 13(a) and 15, R. 12-13, 15-16), and the other, the Cascade

Route, also serving large timber areas and agricultural and livestock producing areas (Special Findings of Fact 14 and 15, R. 13-15, 15-16).

Your petitioner has maintained the Siskiyou Route transporting a substantial and varied traffic and serving a large and important area. The Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines (First paragraph of Special Findings of Fact 15, R. 15-16).

258.13 miles of the Cascade Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property or troops transported for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 6 (b), R. 7-8,).

The land-grant deduction proportion of such charges via the Cascade Route was and is 17.801 per cent between Portland, Oregon, and San Francisco, California, and 17.819 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 6 (c), R. 8).

663.16 miles of the Siskiyou Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property and troops transported for compensation 50 per cent of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 7 (b), R. 9).

The land-grant deduction proportion of such charges via the Siskiyou Route was and is 42.792 per cent between Portland, Oregon, and San Francisco, California, and 42.831

per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 7 (c), R. 9).

On about 75 per cent of the total freight traffic transported by your petitioner on these routes between Oregon and California, the tariff rates are and have been since November, 1931, the same via both the Siskiyou and Cascade Routes, including the rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade Route have been since November 11, 1931, and are now lower than via the Siskiyou Route (Special Findings of Fact 20, R. 20-21). This was the result of decisions and rulings of the Interstate Commerce Commission, an agency of Congress, in its administration of the Fourth Section of the Interstate Commerce Act as amended by the *Transportation Act of 1920*, Sections 418-421, 41 Stat. 484-488. The Interstate Commerce Commission refused to permit your petitioner to establish and maintain Fourth Section rates between the terminals, Portland or East Portland, Oregon, and San Francisco, California, for application via the Siskiyou Route, sufficiently low to enable it to compete for this 25 per cent water-borne freight traffic of coastwise steamship lines operating between Oregon and California ports (Special Findings of Fact 16, R. 16-19; Special Findings of Fact 17, R. 19, 20; Special Findings of Fact 20, R. 20, 21).

Because of the substantially lower cost of hauling freight over the Cascade line or route than over the Siskiyou line or route, on account of lesser grades, curvatures, operating difficulties and somewhat shorter distance on the Cascade Route, the Commission found that the lower Fourth Section rates to enable obtaining some of this traffic in competition with coastwise steamship lines would be reasonably compensatory under the amended Fourth Section and authorized their establishment and maintenance via the Cascade Route. The Commission, on its own motion, required your petitioner to readjust the rates so there would be no

departures from the long-and-short-haul provision of the Fourth Section via the Siskiyou Route. Your petitioner established rates via the Siskiyou Route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates, to, from, and between intermediate points on the Siskiyou Route, which were lower than the rates theretofore found to have been reasonable on the Siskiyou line or route by the Interstate Commerce Commission. These were the rates in effect via the Siskiyou Route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by your petitioner via the Siskiyou Route. All as shown more in detail in the Special Findings of Fact of the Court of Claims (Special Findings of Fact, 16, 17, 20, R. 16-19, 20-21). Succinctly stated, the lower Fourth Section terminal rates exclusively applicable via the Cascade Route on the 25 per cent of traffic which was and is water-competitive, were compelled by an Act of respondent's Congress, administered by its authorized agent, the Interstate Commerce Commission. The particular shipments of respondent involved in this case were within the 25 per cent of the traffic on which the rates were lower via the Cascade Route than via the Siskiyou Route (Special Findings of Fact 10, R. 10-11).

In October, 1931, prior to the above-described revision of rates via the Siskiyou and Cascade Routes, effective November 11, 1931, your petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of respondent in Washington, who was in charge of routing Government freight, of the proposed changes in rates via these Routes, the manner in which same would be applied, and advised such Coordinator of Traffic that either the Siskiyou Route or the Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line. Further, that the Fourth Section terminal rates via the Cascade Route less the land-grant

deduction via that Route that would be available would make a less net charge to the Government than the use of the rates via the Siskiyou Route. Receipt of this communication was acknowledged by the Coordinator of Traffic in October, 1931 (Special Findings of Fact 19, R. 20).

There is no finding by the Court of Claims that your petitioner has ever failed or refused to adequately and satisfactorily transport property of the United States via the Siskiyou Route when requested so to do or that any dissatisfaction with the service afforded via the Siskiyou Route has ever been expressed by any representative of respondent.

The shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments (Special Findings of Fact 4, R. 6). In other words, your petitioner was not requested or required to transport these shipments via the Siskiyou Route.

Your petitioner handled and charged for this unrouted traffic in the same manner as it was legally obligated to handle and charge for unrouted traffic of shippers generally. *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446. Your petitioner transported such unrouted shipments of respondent over the more economical and less costly operated part of the Cascade Route as compared with the Siskiyou Route and assessed charges against and billed respondent on the basis of the lowest net charges via any route of your petitioner between Portland or East Portland, Oregon, and San Francisco, California, which was on the basis of the lowest lawfully published and effective commercial tariff rates for the transportation of such shipments, restricted to and applicable only via the Cascade Route, less 50 per cent for the land-grant deduction proportions on the Cascade Route of 17.801 per cent for transportation between Portland, Oregon, and San Francisco,

California, and 17.819 per cent for transportation between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 11, 12 (a) and 21, R. 11, 12, 21).

Respondent, through its General Accounting Office, made payments to your petitioner for the transportation of these shipments on the basis of the deduction from the total charges computed by applying the lawfully published and effective commercial tariff rates for like transportation service to the public at large or private parties, restricted to and applicable only via the Cascade Route, between Portland or East Portland, Oregon, and San Francisco, California, 50 per cent for the higher land-grant deduction proportions of 42.792 per cent and 42.831 per cent, on the Siskiyou Route, respectively, applicable to commercial tariff charges to the public at large or private parties for transportation service between such points or terminals, via the Siskiyou Route, via which route such low tariff rates did not apply (Special Findings of Fact 12 (b), R. 12).

Your petitioner accepted such payments under protest and brought suit in the Court of Claims to test the right of respondent to enlarge your petitioner's obligations under the clear and unambiguous provisions of the Land-Grant Act contract and to recover the balance due (Special Findings of Fact 12 (c), R. 12). Its petition was dismissed by the Court of Claims and a review of such judgment has now been granted.

Further discussion of the facts is made hereinafter in the argument.

VI.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In deciding upon its Special Findings of Fact, as a conclusion of law, that your petitioner is not entitled to recover and in dismissing its petition.

2. In not deciding, based upon its Special Findings of Fact, that your petitioner has fully complied with its obli-

gations to the Government on the Siskiyou Route, under the provisions of the Land-Grant Act of July 25, 1866, as amended by the Act of May 23, 1928, and is entitled to recover.

3. In expanding by construction the clear and unambiguous terms of your petitioner's obligations to the Government under the Land-Grant Act contract on the Siskiyou Route.

4. In considering and attaching weight in its opinion in arriving at its judgment, to alleged matters or statements of fact or conclusions which are not mentioned in, are wholly unsupported by and in part conflict with the court's Special Findings of Fact.

VII.

Argument.

It is respectfully submitted that the following warrants a reversal of the judgment of the Court of Claims, with direction that judgment be entered in favor of plaintiff, your petitioner, in the sum of $116.31 (22(a) of Special Findings of Fact, R. 21). A few shipments were selected as typical of all included in the petition in order to shorten the presentation (Special Findings of Fact 3, R. 6).

Although not considered to be material, there will be set out hereinafter as a part of this argument a reply to contentions made in the brief for the United States in opposition to the petition for writ of certiorari, as it is anticipated that such are the only ones available in the present instance.

A.

The Court of Claims Erred in Not Deciding Upon Its Special Findings of Fact that Your Petitioner Has Fully Complied With Its Obligations to the Government Under the Land-Grant Act Contract and is Entitled to Recover.

We leave aside for the present, the question of the erroneous expansion of the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract, and the consideration of matters in the opinion of the lower court, which are unsupported by or in conflict with the court's Special Findings of Fact. Although not expressly so stated, the lower court by necessary implication concluded that your petitioner has breached its Land Grant Act contract with the Government respecting the Siskiyou Route and that this entitled the Government, in making settlements with your petitioner, to the greater Siskiyou Route land-grant mileage deductions from charges based on the low Fourth Section commercial tariff rates on these shipments not applicable via the Siskiyou Route but applicable only to shipments via the Cascade Route which has less land-grant mileage.

This conclusion is arrived at in the opinion of the court without any mention or discussion whatever of the provisions of Section 5 of the Land-Grant Act of July 25, 1866, set out in the appendix hereto, covering the obligations of your petitioner and the rights of respondent.

The reasons stated in the opinion of the Court of Claims appear to be:

(a) That your petitioner has practically abandoned through traffic on the Siskiyou Route (R. 28).

(b) That your petitioner now transports through traffic for the general public on the Cascade Route which, before the completion of the Cascade Route, it transported over the Siskiyou Route (R. 28).

(c) The difference in the rates on 25 per cent of the traffic between the two routes, the court stating that the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare circumstances (R. 28-29).

(d) That there could be no inducement to a shipper to use the route via the old land-grant-line (the Siskiyou Route), in view of excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route (R. 29).

In the contract between the parties, being Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant-line, Appendix A, your petitioner's obligations and the corresponding rights of the Government thereunder are clearly set out. Your petitioner is obligated:

(1) To keep said railroad and telegraph in repair and use, and transport the mails thereon and transmit despatches by said telegraph line for the Government, *when required so to do by any department thereof;*

(2) To give the Government preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service;

(3) That said railroad shall be and remain a public highway for the use of the Government of the United States and (as amended by the Act of May 23, 1928) charges for transportation of property or troops of the United States to be 50 per cent less for the land-grant mileage proportion of the route than charges to the general public based on commercial rates for transportation over said railroad;

(4) That property or troops of the United States shall be transported over said railroad (the Siskiyou Route) *when so required by the Government of the United States.*

There is no Finding of Fact in the Special Findings of Fact of the Court of Claims that your petitioner has, in any respect, failed to fully comply with its obligations under this contract. This case involves the transportation of freight and there is no question presented respecting the transportation of troops or the mails upon such railroad or the transmission of despatches by telegraph line, when required so to do by any department of the United States. The contract clearly provides that petitioner shall transport property or troops of the United States over the land-grant Siskiyou Route, *when so required by the Government of the United States.* There is nothing in the Special Findings of Fact of the lower court showing that your petitioner has ever failed or refused to comply satisfactorily with this obligation to transport property or troops of the United States over the Siskiyou Route; *when so required by the Government,* or has failed in any other respect to fulfill its obligations. There is no Finding in the Special Findings of Fact of the lower court that the adequacy of your petitioner's freight train service via the Siskiyou Route has ever been questioned by any representative of the Government or department of the Government having any connection with transportation of freight of the Government or by the accounting officers of the Government. Not only do such Findings not show that your petitioner has ever failed or refused to transport property or troops of the United States adequately and satisfactorily via the Siskiyou Route but there is no Finding that any request or requirement by the Government of the United States in any instances or particular instance has been made that your petitioner do so. *This is the requirement of the contract.*

In the instant case, the shipments in question were unrouted by the Government as to any particular route of your petitioner (Special Findings of Fact 4, R. 6). If the

Government had routed such shipments via the Siskiyou Route, this would have been a requirement, as provided in the contract, that the shipments be so transported by your petitioner. The Special Findings of Fact of the lower court show that your petitioner, complying with its duty under the general law, *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446, gave the Government the benefit of the lowest available net charge on each of such shipments between Portland or East Portland, Oregon, and San Francisco, California. These lowest net charges were based upon the applicable commercial lower Fourth Section rates restricted to the Cascade Route, less the appropriate land-grant deductions represented by the land-grant mileage on that route to which such rates were restricted and only applied (Special Findings of Fact 11, 12(a), R. 11, 12).

So far as concerns the reasons stated in the opinion of the Court hereinbefore set out as (a) and (b), that your petitioner has practically abandoned through traffic on the Siskiyou Route and transports through traffic for the general public on the more economical Cascade Route, which it previously transported over the Siskiyou Route, the attention of the Court is called to the clear and unambiguous provisions of this Land-Grant Act contract. Your petitioner is obligated to keep the railroad and telegraph in repair and use and to transport property or troops of the United States thereover when so required by the Government of the United States. It is not obligated to the Government to transport any particular amount of through freight traffic for the general public via the Siskiyou Route and the law does not require it to do so unless the shipper routes such traffic via the Siskiyou Route.

Your petitioner has not abandoned the Siskiyou Route for traffic of any description. The Court of Claims finds in its opinion that the Siskiyou Route has not been abandoned by your petitioner and has been kept in good repair and is open for through transportation between San Francisco and Portland (R. 28). This is fully supported by the

Special Findings of Fact. Special Findings of Fact 5 (R. 7), is that your petitioner has maintained and operated both the Siskiyou and Cascade Lines or Routes for freight, passenger and all classes of traffic. Through traffic is a class of traffic. Special Findings of Fact 15 (R. 15-16), is that your petitioner has two complete lines of railroad or routes, one the Siskiyou Route, serving the valleys and areas described, producing much tonnage of timber, agricultural products, livestock, etc., and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. It is also found that your petitioner has maintained the Siskiyou Route, transporting a substantial and varied traffic and serving a large and important area, and it is further found that the Siskiyou Route and the Cascade Route are two separate routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines.

Completion of the construction of the Cascade Route was found by the Interstate Commerce Commission to be required by the present and future public convenience and necessity and such construction was authorized by the Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act in *Finance Docket No. 2873*, 82 I. C. C. 185.

There has been no abandonment in any respect of the Siskiyou Route or any part thereof. This would require authority of the Interstate Commerce Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act requiring a certificate based on the finding that the present or future public convenience and necessity permit of such abandonment, which, in view of the Special Findings of Fact herein, obviously could not be obtained.

Referring to the third reason appearing in the opinion of the lower court, hereinbefore shown as paragraph (c),

respecting the difference in the rates between the two routes on 25 per cent of the traffic (Special Findings of Fact 20, R. 20-21). Your petitioner has not forced shippers, including the United States, to use the Cascade Route. Your petitioner sought but was not permitted to establish rates via the Siskiyou Route sufficiently low to enable it to participate in the traffic susceptible of water transportation by coastwise lines, via the Siskiyou Route. Shippers would not ship via the Siskiyou Route at the minimum rates authorized by the Interstate Commerce Commission. The lower Fourth Section terminal rates were authorized by the Interstate Commerce Commission for application via the Cascade Route because of the lower cost of operation via that route (Special Findings of Fact, 16, 17, 20, R. 16-19, 19-20, 20-21). Manifestly it cannot be held that your petitioner has breached its Land-Grant contract with the Government by not establishing rates sufficiently low via the Siskiyou Route to obtain traffic from shippers for transportation via this route in competition with coastwise steamship lines when the laws of respondent, the United States, the other party to the contract, prevented it from so doing as shown in the Special Findings of Fact referred to. This difference in rates between the two routes resulted from decisions of the Interstate Commerce Commission in the administration of the *Fourth Section* of the *Interstate Commerce Act* as amended by the *Transportation Act of 1920*, Secs. 418-421, 41 Stat. 484-488, interpreted by the Interstate Commerce Commission in *Transcontinental Cases of 1922*, 74 I. C. C. 48, 70, 71. The Transportation Act evinced an enlarged and different policy upon the part of Congress. In passing upon the reasonableness and lawfulness of rates for the future, the Interstate Commerce Commission speaks as the Legislature and its pronouncement has the force of a statute. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 385, 386.

The fourth reason in the opinion of the Court (d) is that there could be no inducement to a shipper to use the route

via the old land-grant line (the Siskiyou Route) in view of the excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route. This reference to excessive rates, as will hereinafter be pointed out, directly conflicts with the Court's Special Findings of Fact.

Respecting train service under the Special Findings of Fact of the Court that the Siskiyou Route is maintained and operated by your petitioner for freight, passenger and all classes of traffic, the lower court stating in its opinion that your petitioner has not abandoned the Siskiyou Route but has kept same in good repair and open for through traffic, it is immaterial what the comparative train service may have been at the time of these shipments. These shipments, as shown, were unrouted by the Government. There is no Finding that the Government requested your petitioner to transport these shipments via the Siskiyou Route, which is the provision of the Land-Grant contract, and there is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for any shipper routing shipments or requesting service via this route. The Interstate Commerce Commission has jurisdiction under the provisions of the *Interstate Commerce Act*, 41 Stat. 476, to require adequate and satisfactory train service via any route upon the complaint of shippers, including the Government. *Johannesburg Mfg. Co.* v. *Michigan Central R. Co.*, 151 I. C. C. 61.

As to the inducement to a shipper to use the route, referred to in the Court's opinion, it is submitted that on the 25 per cent of the traffic which is water-competitive your petitioner did its best to induce shippers to use the Siskiyou Route by undertaking to obtain from the Interstate Commerce Commission the necessary authority under the *Fourth Section* of the *Interstate Commerce Act*, as amended

by the *Transportation Act of 1920*, to establish rates sufficiently low over the Siskiyou Route, including the rates between Portland or East Portland, Oregon, and San Francisco, California, to obtain some of this traffic from shippers in competition with coastwise steamship lines for transportation via the Siskiyou Route. The laws of the United States prevented this and there was and is nothing that your petitioner can do to induce shippers to use the Siskiyou Route. Furthermore, as seen from an examination of the clear and unambiguous provisions of the Land-Grant Act contract, such imposes no obligation on your petitioner not to use the more economical and less costly operated Cascade Route for through traffic of the general public when such is not routed via the Siskiyou Route by the shipper. Under the provisions of *Section 15(8)* of the *Interstate Commerce Act* shippers have the right to determine and designate over which line or route their traffic shall be transported and railroads are obligated to observe such routing instructions of the shipper. There is no Finding in the Special Findings of Fact that shippers are not routing their traffic via the Cascade Route and there is no Finding of any demand, request, or reason for any different character of freight train service via the Siskiyou Route than afforded by your petitioner.

Prior to the revision of rates via the Cascade and Siskiyou Routes resulting from the decision of the Interstate Commerce Commission, your petitioner gave written notice to the Government that either the Siskiyou or Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line (Special Findings of Fact 19, R. 20).

B.

The Court of Claims Erred in Expanding by Construction the Clear and Unambiguous Terms of Your Petitioner's Obligations to the Government Under the Land-Grant Act Contract.

In the opinion of the Court of Claims (R. 26, 27, 29), controlling weight in arriving at its decision is given to what is stated to have been the past administrative method or construction of respondent's accounting officers in making like settlements with land-grant railroads, thus expanding the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract. This is the effect of the judgment although there is no mention of the language of the Land-Grant Act in the opinion of the Court. As will be hereinafter pointed out, there is no mention in the Special Findings of Fact of the court of any method of settlement employed by respondent's accounting officers in the past.

The Provisions of the Statute Are Clear and Unambiguous and the Government is Bound by the Provisions of the Contract Set Out Therein.

The question of the correct measure of damages, if the statutory contract has been breached, aside, the only matter for consideration is whether or not your petitioner has complied with its obligations to the Government under the Land-Grant Act contract. Such obligations are set out in Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, shown in Appendix A. The clear and unambiguous obligations of your petitioner and the corresponding rights of the Government thereunder have been referred to hereinbefore. The express provisions of the statute constitute the contract between the parties and the Government is bound by the provisions of this contract.

Lake Superior & Miss. R. R. Co. v. *United States*, 93 U. S. 442, l. c. 454-455;

United States v. *Central Pacific R. R. Co.*, 118 U. S. 235, l. c. 238;
Burke v. *S. P. R. R. Co.*, 234 U. S. 669, l. c. 680;
Union Pacific R. R. Co. v. *United States*, 104 U. S. 662, l. c. 664;
United States v. *Northern Pacific Ry. Co.*, 256 U. S. 51, l. c. 64;
United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, l. c. 404.

The Applicable and Well-Established Rule of Law Respecting Statutory Construction is that it is Not Allowable to Interpret What Has No Need of Interpretation. Long Usage is of no Avail Against a Plain Statute.

There is no doubt about the meaning and no ambiguity in the provisions in this land-grant act contract, either respecting the rights of the United States or the obligations of your petitioner thereunder. But irrespective of the fact that the provisions of this land-grant act contract are clear and unambiguous and that there can be no doubt whatever respecting the meaning of any language used therein, the lower court has erroneously held that the provisions of this contract can be and have been changed by the administrative construction of respondent's accounting officers. In addition, such past rulings of respondent's general accounting officers were applied to a different set of facts from those presented in this case as was also the decision of the Circuit Court of Appeals in *United States* v. *Northern Pacific Ry. Co.*, 30 Fed. (2d) 655, 32 Fed. (2d) 698. These are referred to in the brief of the United States and will be discussed hereinafter.

However, irrespective of what facts may have been presented in these other cases, the rule has been so long and consistently established by this Court that the province of construction lies wholly within the domain of ambiguity that reference to only a few of the many decisions will suffice.

In *United States* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404, this Court held:

> The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* (Italics ours.) When considering another question arising under a like provison in a land grant Act, this Court said: "It might be very convenient for the Government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454.

In *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277, this Court said:

> We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

In *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, this settled rule is announced:

> Inded the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity.

See also

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;

Caminetti v. *United States*, 242 U. S. 470, 485;
Houghton v. *Payne*, 194 U. S. 88, 89, 100;
United States v. *Graham*, 110 U. S. 219, 221;
Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

C.

The Court of Claims Erred in Considering and Attaching Weight in Its Opinion in Arriving at Its Judgment, to Alleged Matters or Statements of Fact or Conclusions Which Are Not Mentioned in, Are Wholly Unsupported by, and in Part Conflict With, the Court's Special Findings of Fact.

The correctness of the judgment of the Court of Claims depends upon its Special Findings of Fact, made a part thereof, without regard to statements of fact, reasoning or conclusions that may be found in its opinion.

In *M. E. Blatt Company, Petitioner,* v. *United States*, Opinion, United States Supreme Court, December 5, 1938, 59 S. Ct. Rep. 186, 189, in reviewing a judgment of the Court of Claims, this Court said:

> Concretely, the question presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. *And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.* (Italics ours.)

The same ruling is announced in the following decisions:

Stone v. *United States*, 164 U. S. 380, 383;
Crocker v. *United States*, 240 U. S. 74, 78;
Brothers v. *United States*, 250 U. S. 88, 93;
United States v. *Wells* 283 U. S. 102, 120;
United States v. *Esnault-Pelterie*, 299 U. S. 201, 206.

Great weight appears to be given in the opinion of the Court of Claims to the following statements of fact or con-

clusions, which are not mentioned in and are wholly unsupported by the court's Special Findings of Fact.

(a) The past administrative method, practice or construction of respondent's accounting officers in making settlements with land-grant railroads (R. 26, 27, 29).

(b) The stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655 (R. 26-27), which, for obvious reasons, would not have been competent had such been offered in evidence in this case. The report of the decision shows that your petitioner was not a party to that case or to such stipulations.

(Even if the alleged past method of settlement of respondent's accounting officers and the stipulations of the parties in the *Northern Pacific* case were competent, had been included in the Findings and could be properly considered, such would be inapplicable here. As shown by the Special Findings of Fact and the Land-Grant contract, there has been no abandonment of any part of the Siskiyou Route and no substitution in whole or in part for the longer aided and original line (The Siskiyou Route). This distinction will be discussed later.

(c) The acquiescence for a like period by land-grant railroads, including your petitioner, in such administrative construction of respondent's accounting officers (R. 26, 27).

(See Comptroller of Treasury decision, April 17, 1888, 3 Dig. 2nd Comp. 299, involving form of accounting for payment of bonds and not a land-grant case, 17 Comp. Dec. 633, 21 Comp. Dec. 238, 24 Comp. Dec. 193, 3 Comp. Gen. 267, 10 Comp. Gen. 552, and 15 Comp. Gen. 614, where the facts presented were different from the facts of this case but where the railroads objected or protested instead of acquiescing as stated in the opinion. That this case is distinguishable on the facts from the basis of these rulings of respondent's accounting officers, relied upon by it to sus-

tain this judgment of the lower court, will be hereinafter shown.)

The following statements of facts or conclusions in the opinion of the Court of Claims, to which great weight appears to be attached, conflict with the court's Special Findings of Fact.

(a) That your petitioner secured or sought authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route (R. 25). The statement conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21). Your petitioner sought authority to reduce the rates via the Siskiyou Route under the Fourth Section of the Interstate Commerce Act sufficiently to enable competition with coastwise lines, which the Commission refused to grant.

(b) That the rates established and maintained by your petitioner over the Siskiyou Route were or are excessive rates (fifth line, R. 29). The statement directly conflicts with Special Findings of Fact 17 (R. 19). The rates established and maintained via and on the Siskiyou Route were and are lower than found to be reasonable on that line by the Interstate Commerce Commission. They could not be excessive.

(c) By implication, that your petitioner forced shippers, including the United States, to use the Cascade Route instead of the Siskiyou Route by restricting the application of the lower scale of rates to the Cascade Route (R. 28-29). This has been discussed hereinbefore. The laws of respondent, administered by the Interstate Commerce Commission, prevented the establishment of such rates via the Siskiyou Route and compelled their restriction to the Cascade Route. The statement in the opinion conflicts with Special Findings of Fact, 16, 17 and 20 (R. 16-19, 19-20, 20-21).

D.

The Judgment of the Court of Claims Imposes an Obligation on Your Petitioner and Vests a Right in the Government Not Assumed by Your Petitioner or Conferred Upon the Government Under the Clear and Unambiguous Provisions of the Land-Grant Act Contract, and, if Enforced, Would Deprive Your Petitioner of Its Property Without Due Process of Law in Violation of the Fifth Amendment.

It is respectfully submitted that it has hereinbefore been shown that your petitioner has not breached its Land-Grant Act contract with the Government. The judgment of the Court of Claims that your petitioner is not entitled to recover, if enforced, would vest a right in the Government to make land-grant mileage percentage deductions from charges to the general public based upon lawfully published and effective tariff rates not applicable via such land-grant mileage, to which the Government is not legally entitled under the provisions of such contract. Such judgment, if enforced, would deprive your petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235, 240, 241, the Supreme Court held:

> There is another view of this controversy which seems to us conclusive. As the contract between the United States and the railroad company contained in the acts of July 1, 1862, and of July 2, 1864, has been interpreted by this court to authorize the retention by the government of compensation for services only on those roads which the United States aided in building, the construction which the appellants seek to put on the second section of the act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee. We are bound, if possible, so to construe the law as to lay it open to neither of these objections. *Broughton* v. *Pensacola*, 93 U. S.

266; *Red Rock* v. *Henry*, 106 U. S. 596; *Hobbs* v. *McLean*, 117 U. S. 567, decided at the present term, and cases there cited; *United States* v. *Coombs*, 12 Pet. 72. The construction contended for by the appellee preserves the good faith of the government, and frees the act from the imputation of impairing rights secured by the Constitution of the United States.

The following is stated in the opinion of the Court in *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, l. c. 64:

> The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679-680. The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place, *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387. Such rights are within the protection of the due process of law clause of the Constitution. *Sinking-Fund Cases*, 99 U. S. 700, 718.

In *Boeing Air Transport* v. *Farley*, 75 Fed. (2d) 765, the United States Court of Appeals for the District of Columbia held, l. c. 767:

> If the contracts in question were property, and if the order depriving plaintiffs of their rights without notice or hearing is void, it amounted to the taking of their property without due process. That the contracts were property we think is clearly held in the recent case of Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 843, 78 L. Ed. 1434, where Mr. Justice Brandeis, speaking for the court, said: "Valid con-

tracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R. Co., 118 U. S. 235, 238, 6 S. Ct. 1038, 30 L. Ed. 173; United States v. Northern Pacific R. Co., 256 U. S. 51, 64, 67, 41 S. Ct. 439, 65 L. Ed. 825. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. * * * 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking-Fund Cases (Union P. R. Co. v. U. S.), 99 U. S. 700, 719, 25 L. Ed. 496.

E.

Erroneous Contentions of Respondent, Found Also in Substance in the Opinion of the Court of Claims.

The principal contention advanced in respondent's brief in opposition to the petition for writ of certiorari, briefly put, appears to be that certain specified rulings of accounting officers of the Government and a decision of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655, 32 F. (2d) 698, were based upon facts like the facts presented in this case and constituted legal warrant for the expansion of the clear and unambiguous terms of your petitioner's obligations under the land-grant act contract by the construction of the Court of Claims based thereon. This is erroneous in every particular. Certain other contentions of respondent will be referred to.

The Decision of the Circuit Court of Appeals of the Eighth Circuit in the Northern Pacific Case is Clearly Distinguishable on the Facts. Further, the Circuit Court of Appeals Erred in the Rule Announced Respecting Weight to be Given Administrative Construction Without Qualification Respecting Ambiguity.

The decision of the Circuit Court of Appeals, Eighth Circuit, in the *Northern Pacific Case*, supra, is discussed and quoted from in the opinion of the lower court (R. 26, 27, 28). In the opinion of the lower court in this case (R. 29), it is in substance stated that your petitioner may not deprive the Government of its lawful land-grant deductions by routing the shipments over new segments or cut-offs connecting with the Siskiyou Line, constructed without the aid of land grants, and if your petitioner is permitted to do so, it may continue to construct new segments without the aid of land grants until an entirely new line, constructed without any aid of land grants, parallels the Siskiyou Line from San Francisco to Portland, thus depriving the Government of its entire land-grant deductions for services that should be furnished between San Francisco and Portland over the old route. This is in substance the same as stated by the majority of the Court in the *Northern Pacific Case*, l. c. 659, under the different facts there presented.

Manifestly, if based upon an examination of the clear and unambiguous provisions of this land-grant act contract and the facts of this case, your petitioner has not breached any of its obligations to the Government or violated any of the rights of the Government, under such contract, then it cannot be held, in effect, that judgment for your petitioner in this case would enable it to continue to construct new segments without the aid of land grants paralleling the land-grant route until an entirely new line is constructed, thus depriving the Government of its entire land-grant deductions. Obviously, if a railroad con-

structed an entirely new line without the aid of land grants and discontinued rates and service on the land-grant line, it would not have fulfilled its obligations to the Government under any land-grant act contract similar to the contract presented for consideration in this case, if the Government requested the transportation of its property over the land-grant line and the railroad failed or refused to furnish such transportation. It would, in such event, deprive the Government of its right to land-grant deductions. But there are no such facts presented on the record in this case. Your petitioner has not deprived the Government of any legal right under the contract to land-grant mileage deductions by routing the unrouted shipments in question over the Cascade Line. The Government did not route the traffic or request that it be routed via the Siskiyou Route. This is the requirement of the contract. Clearly, the legal duty and obligation of your petitioner under the facts presented was to give the Government, as a shipper, the benefit of the lowest available net charge between the points of origin and destination. This your petitioner did and as a consequence thereof, the Government obtained transportation of this traffic at less cost than would have been available to the Government had the Interstate Commerce Commission not authorized the low fourth section rates between these terminals for application via the Cascade Route based on the lower cost of operation via the Cascade Route. Instead of anything having occurred to the detriment of the Government by reason of the difference in rates between the Siskiyou and Cascade Routes which resulted from the operation of the laws of the respondent in this case, the Government has been benefitted.

Under the provisions of paragraph (18), Section 1, Part I of the Interstate Commerce Act, a railroad cannot construct an extension of its line of railroad or a new line of railroad, including so-called cut-offs, or acquire or operate any line of railroad, or extension thereof, or engage in

transportation over or by means of such additional or extended line of railroad unless it can obtain from the Interstate Commerce Commission authority to do so and a certificate that the present or future public convenience and necessity require such construction and operation. This is the law of the United States, administered by the Interstate Commerce Commission as an agency of Congress, which Tribunal speaks as the legislature and whose orders have the force and effect of statutes. Such is the decision of this Court in *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company*, supra.

Therefore, it is submitted that an assumption that your petitioner may do something in the future which would constitute a violation of its obligation under the land-grant act contract, has no application to the facts of this case which show no breach of its obligations. Furthermore, your petitioner could not and cannot construct or operate any new line of railroad without being authorized by the Interstate Commerce Commission to do so upon a finding that such is required by public convenience and necessity.

The facts in the *Northern Pacific Case*, agreed to in the stipulations of the parties, may or may not be sufficient to legally show that the railroad in that case had breached its contract with the Government. No effort appears to have been made to obtain a review of this decision. In any event, the decision of the Circuit Court of Appeals apparently is that the railroad had breached its contract. The facts of the *Northern Pacific Case* are clearly distinguishable from the facts presented in this case. It is unnecessary to here repeat what has hereinbefore been said respecting the maintenance and operation of the Siskiyou Route by petitioner with through rates lower than previously prescribed as reasonable by the Interstate Commerce Commission, and your petitioner's notice to the Government that it would give through service to the Government via either the Siskiyou or the Cascade Route. An examination of the opinion of the Court in the *Northern Pacific Case* reveals an entirely different set of facts from those presented here.

In the *Northern Pacific Case*, it was expressly stipulated between the parties that the passenger train service maintained by plaintiff via Brainerd and Meeker was not designed for the accommodation of continuous, through travel from St. Paul to Seattle and was not suitable and adequate for the use of defendant in the transportation of troops from St. Paul to Seattle. It, therefore, appears that the railroad in the *Northern Pacific Case* agreed in the stipulation between the parties that it had discontinued through passenger train service via the land-grant line. It failed to afford this service for the troops of the United States, passengers not turned over to a railroad unrouted. It appears from the stipulation that the contract between the Northern Pacific and the Government provided for safe and speedy transportation of the mails, troops, munitions of war, and public stores over the land-grant line, l. c. 656.

The Court found in the *Northern Pacific Case* that the so-called cut-offs were in no sense additions which, when constructed without Government aid, do not carry land-grant obligations, l. c. 658-9.

The part of your petitioner's Cascade Route between Black Butte and Springfield Junction, via Klamath Falls, is not a mere straightening of the Siskiyou Route but is a substantial addition constructed without Government aid. That this part of the Cascade Route is a substantial addition and not a mere straightening or shortening of the Siskiyou land-grant route, is shown in the Special Findings of Fact of the Court. It is expressly stated in the first paragraph of Finding 15 (R. 15, 16) that the Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines. There is no such showing in the stipulation of facts in the *Northern Pacific Case*. There was some modification of the Court's findings in the *Northern Pacific Case* in its decision denying rehearing, 32 F. (2d) 698. The gist of the decision of the majority of the Court, clearly dis-

tinguishing that case from the facts presented in this case, is stated as follows in its opinion denying rehearing, l. c. 699:

> The decisive facts remain that, as stated in the first paragraph above, as amended, for more than three decades the route from St. Paul to Seattle via Brainerd and Meeker has been accepted by both parties hereto as a route subject in part to land grant deductions; that until the transportation which forms the basis of this suit, these deductions were computed upon a total mileage of 1,962.21 miles, with a land grant mileage of 1,855.67 miles, a ratio of 47.285; that the Little Falls-Staples and Palmer Junction-East Auburn cut-offs constitute a mere straightening or shortening of an established and mutually recognized land grant route of long standing; that, by the construction of these cut-offs and the withdrawal of through trains and fares over the former route, the railroad has, in effect, established a lieu line, and has abandoned that former route for adequate through Government travel.

The Circuit Court of Appeals finds:

(1) That the sections of new line referred to constitute a mere straightening or shortening of an established and mutually recognized land-grant route of long standing;

(2) That the railroad had withdrawn through trains and fares over the land-grant line in question;

(3) That in view of the above, the railroad had, in effect, established a lieu line and had abandoned the former route for adequate through Government travel.

As contrasted with the above findings in the *Northern Pacific Case*, the Special Findings of Fact here show:

(1) That petitioner's line of railroad on the Cascade Route between Black Butte and Springfield Junction, via Klamath Falls, is not a mere straightening or shortening of the Siskiyou land-grant route but constitutes a substantial addition to petitioner's system of railroads. *United*

States v. *Kansas Pac. R. Co.*, 99 U. S. 455; *United States* v. *Central Pac. R. Co.*, 118 U. S. 235. In addition to what is set out in the Special Findings of Fact of the Court, petitioner's Exhibit 23, made a part of Special Finding of Fact 5 (R. 7), shows that this line of railroad is connected up at Klamath Falls with another line of railroad of petitioner extending to and joining petitioner's transcontinental route on the old Central Pacific Line east of Reno, Nevada;

(2) That petitioner in this case maintains through freight rates via the land-grant Siskiyou Route lower than the rates previously found by the Interstate Commerce Commission to have been reasonable, is obligated under the law to maintain adequate through freight train service via any route to meet requirements, and no question has ever been raised by anyone connected with the Government concerned with shipping freight or settlement of accounts respecting the adequacy or satisfactory nature of such through freight train service; the record does not show that petitioner has ever failed to afford satisfactory service to the Government via the Siskiyou Route, when required by the Government to do so, as provided in the contract. The record does show that your petitioner notified the Government that the Siskiyou Route and the Cascade Route could and would be used and your petitioner would respect the Government's routing as to either line (R. 20).

(3) It follows that petitioner has not established a lieu line and has not abandoned in any respect the Siskiyou Route.

In the above quotation from the second opinion of a majority of the Court in the *Northern Pacific Case*, reference is made to the acceptance by both parties of the route from St. Paul to Seattle, via Brainerd and Meeker, as being subject in part to land-grant deductions. There was no intimation of any ambiguity or uncertainty in the pro-

visions of this Northern Pacific land-grant contract in the opinion of the Court. It is submitted that the decisions of this Court hereinbefore discussed show that where the provisions of a statute or a contract are unambiguous and free from doubt, such consideration is immaterial, and the Court erred in its decision in the *Northern Pacific Case.*

In *Norton Iron Works* v. *Standard Slag Co.*, 13 F. (2d) 622, the Circuit Court of Appeals, Sixth Circuit, held, l. c. 623:

> There are many cases holding that ambiguities arising from the words employed in a contract are removed by practical construction placed upon them by the conduct of the parties. *Toplift* v. *Toplift*, 122 U. S. 121, 7 S. Ct. 1057, 30 L. Ed. 1110; *Indian, etc.*, v. *Bartlesville, etc.* (C. C. A.) 288 F. 273. But this rule is not applicable to contracts that are plain in their terms. Such contracts must be given their proper legal construction; otherwise there would be a denial of the terms, and a contract made for the parties to which they had not agreed. *Lehigh Valley R. Co.* v. *Stewart*, 37 N. J. Law, 53; *Griffin* v. *Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115; *Pressed Steel Car Co.* v. *Union Pacific R. Co.* (C. C. A.) 297 F. 788.

In *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 82 Fed. (2d) 94, 96, the Circuit Court of Appeals, Sixth Circuit, held that the practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument.

The Circuit Court of Appeals, Eighth Circuit, has many times announced the correct rule of construction.

> *Helvering* v. *St. Louis Southwestern Ry. Co.*, 84 Fed. (2d) 857, l. c. 858, Circuit Court of Appeals, Eighth Circuit. This Court decided the *Northern Pacific Case, supra,* in 1929. This decision in 1936 held that where the provisions of a statute are unambiguous, there is no power to amend it by regulation.

Helvering v. *Northwestern Nat. Bank & Trust Co.*, 89 Fed. (2d) 553, l. c. 556, where the Circuit Court of Appeals, Eighth Circuit, held in 1937 that a plain, unambiguous statute cannot be amended by administrative regulation.

Walker v. *United States*, 83 Fed. (2d) 103, l. c. 106. Here again the Circuit Court of Appeals, Eighth Circuit, in a decision rendered in 1936 subsequent to the *Northern Pacific* decision in 1929, with rather extensive citation of authorities, held that if the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute and neither legislative nor executive construction, nor both, is of any aid or force.

Minnesota Tea Co. v. *Commissioner of Internal Revenue*, 76 Fed. (2d) 797, l. c. 799. Here again the Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1935, held that it is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used and if that is plain, there is an end to construction, and the statute is to be taken to mean what it says.

Johnson v. *Southern Pacific Company*, 117 Fed. 462, l. c. 465. The Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1902, held that construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain; that in such a case they serve only to create doubt and to confuse the judgment and when the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses and no room is left for construction.

Deming v. *McClaughry*, 113 Fed. 639, l.c. 641. The Circuit Court of Appeals, Eighth Circuit, in a decision rendered in 1902 prior to the decision in the *Northern Pacific Case*, held that while the opinions of the officers of the executive departments of the Government may be permitted to lead the way to the proper construction of ambiguous statutes entrusted to them to enforce, yet where the words of the acts are plain, and their meaning is clear, these must prevail.

Webber v. *St. Paul City Ry. Co.*, 97 Fed. 140, l. c. 144-5. The Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1899, held that there is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction.

If petitioner and railroads generally had acquiesced in this administrative construction or method of settlement with land-grant railroads by respondent's accounting officers, such acquiescence would not change the terms of the land-grant act contract.

Rulings of Respondent's Accounting Officers Distinguished On the Facts Presented. Further, Railroads, Including Petitioner, Have Not Acquiesced.

Although there is no support in the Special Findings of Fact, in the opinion of the lower court an alleged accounting practice in making settlements with land-grant railroads, in cases involving the same or similar questions, is stated to have been consistently and uniformly followed by respondent's accounting officers for more than fifty years starting with the decision of the second Comptroller of the Treasury on April 17, 1888 (R. 26). This stated administrative practice of respondent's accounting officers is used for the expansion of petitioner's land-grant obligations by construction, it being stated that the rule is fortified when the administrative construction has been acquiesced in for a like period by the adverse or opposite party as the land-grant railroads have done in this case. (R. 27) This is also not mentioned in the Special Findings of Fact of the Court. However, the following is an analysis of the rulings of the Comptroller of the Treasury and the Comptroller General, referred to in the brief for the United States previously mentioned, including those referred to in the opinion of the lower court. It is submitted that this analysis of these rulings shows that the facts were different from

the facts presented in this case and that, furthermore, the railroads have not acquiesced. The difference on the facts is that in this case, there has been no abandonment of any part of the Siskiyou Route. The facts of these other cases are hereinafter discussed sufficiently to show that even if legally permissible to change unambiguous contracts by a consideration of administrative construction, such rulings are applicable.

The ruling of the second Comptroller of the Treasury, April 17, 1888, 3 Dig. Dec. 2nd Comp. 299. This decison of the second Comptroller of the Treasury did not involve any question respecting land-grant deductions. The question presented and decided was what proportion of the compensation should be carried to the railroad's credit on the Government books and what proportion paid directly to the railroad. The line of railroad in question was a bond-aided and not a land-grant line. In either case, whether the compensation for transportation was credited to the railroad on the Government books in partial payment of the bonds or whether paid directly to the railroad, the railroad obtained the benefit to the full amount either through partial extinguishment of its obligation on the bonds or payment to it in cash. The facts of the case clearly distinguish it from this land-grant deduction performance in which the railroad receives nothing either by way of credit or cash. The decision was the result of an objection by the railroad to the Government's method of accounting. This decision was erroneous and, it is submitted, conflicts with the decisions of this Court in *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235, and *United States* v. *Kansas Pacific*, 99 U. S. 455.

5 Comp. Dec. 364. This communication from the acting Comptroller of the Treasury to the Secretary of War in 1899 involved a bond-aided road and not the question of land-grant deductions, is similar to the memorandum of the second Comptroller's office, April 17, 1888, and comments hereinbefore made in that connection apply.

17 Comp. Dec. 633. This appears to be the first ruling respecting land-grant railroads. The basis of settlement was protested or questioned by the railroad involved. The communication from the Comptroller of the Treasury to the Secretary of War was under date of February 28, 1911. *The land-grant line between certain points had been discontinued on account of a change in a river bed.* The ruling was that where a railroad company accepts lands granted by the Government to aid in the construction of a railroad, it thereby accepts the conditions of the grant and that the obligation thus incurred by the railroad should not be diminished because of a change of its route or trackage. The facts presented on which this ruling was made are entirely dissimilar to the facts presented in this case. It is shown in the Special Findings of Fact of the lower court and stated in the opinion of the lower court that the land-grant portions of the Siskiyou Route between Springfield Junction and Black Butte, via Ashland, and between Tehama and Roseville, have not been abandoned by the petitioner and have been kept in good repair and are open for through traffic between San Francisco and Portland. This administrative construction, if it could properly be considered in this case, should be viewed in the light of the dissimilar facts presented in the two cases. It has no application to the facts of this case.

21 Comp. Dec. 238. This was a decision by the Comptroller of the Treasury in October, 1914. It arose upon the protest of the Atchison, Topeka & Santa Fe Railway Company or application of this company for a revision of the action of the auditor for the Interior Department in disallowing $4.26 on its claim for transportation of 15,200 pounds of cement from Chanute, Kans., to Holbrook, Ariz. The railroad company claimed for said service a certain net rate on the basis of a certain gross rate, less land-grant deduction via Ottawa and Emporia, Kans., a distance between Chanute and Albuquerque of 915.77 miles with 419.92 land grant. The auditor allowed a lower net rate based on the

same through gross rate less land-grant deduction by Lawrence, Kans., a distance between Chanute and Albuquerque of 947.90 miles, with 511.34 miles land grant. Both routes were wholly operated by the Atchison, Topeka & Santa Fe Railway. The decision contains recitals of land grants unnecessary to here set out. *It is stated in the decision that since the original grant, branch lines have been built, making connections at various points, thereby making new through routes to the abandonment, in part, of the aided through route.* It is stated that the holding of the accounting officers has been that the changing of a line of railroad and abandoning of any part of the original aided line does not deprive the Government of its original rights, and settlement for service over the new line is, therefore, required to be made as if the transportation were over the original line. This administrative construction, whether or not legally correct, has no application to the facts of this case. There has been no abandonment of any part of the land-grant mileage on the Siskiyou Route. It will be noted that the railroad protested such action under the facts there presented.

24 Comp. Dec. 193. This was a decision by the Comptroller of the Treasury in October, 1917. The Missouri Pacific Railway Company had protested or requested a reconsideration of the decision of the Comptroller of the Treasury in May, 1917, revising a settlement in March, 1917, of the Auditor for the State and Other Departments. *The original line was shortened and although not expressly so stated, it appears by inference from the discussion that the land-grant section was abandoned.* The decision shows that the Missouri Pacific Railway Company objected to such method of settlement and requested a reconsideration. It cannot properly be said that this railroad agreed with and acquiesced in such performance.

3 Comp. Gen. 267. This was a decision by the Comptroller General in October, 1923. The Southern Pacific

Company objected and applied for review of a settlement of transportation charges on a shipment of high explosives from Marshall (Spokane), Wash., to Roseburg, Oregon. In its application for review, the company claimed an additional allowance of $83.09, based on the fact that the published rate from Marshall to Portland was only applicable via the Northern Pacific Railway, Pasco, thence Spokane, Portland & Seattle Railway, and that there was no through rate published which applied via the Northern Pacific Railway land-grant line through Tacoma. *The facts were that the Northern Pacific Railway Company had discontinued through rates on the land-grant line in question and published same for application via the newly acquired non-land-grant line between Pasco and Portland, thus substituting said line for its own original aided line.* Whether or not legally correct, the decision in that case was based upon facts dissimilar to those presented in this. Petitioner has a complete line of through freight rates lower than previously prescribed by the Interstate Commerce Commission as reasonable, which it has established and maintains via the Siskiyou Route and has offered to serve the Government via either the Siskiyou Route or the Cascade Route, as requested. It will be noted that the case referred to did not involve any question of land-grant mileage on Southern Pacific Lines but that the Southern Pacific Company, as the collecting carrier, objected to and did not acquiesce in such method of settlement.

10 Comp. Gen. 552. This was a communication from the Comptroller General to the Postmaster General under date of June 23, 1931. The inquiry from the Postmaster General involved the transportation of the mails. The letter from the Postmaster General to the Comptroller General shows that the Missouri Pacific Railroad Company protested the action taken by the Post Office Department. It did not acquiesce in its method of settlement. It is stated in this decision *that the 3.67 miles involved was not over the land-*

grant line but was substituted for mileage over the original land-grant line, which it was held the railroad was not entitled to abandon. There has been no substitution of mileage in this case. The Siskiyou Route remains open. In this communication from the Comptroller General to the Postmaster General in June, 1931, reference is made to the decision of the Circuit Court of Appeals, Eighth Circuit, in *United States* v. *Northern Pacific Railway Company,* supra.

15 Comp. Gen. 614. This was a communication from the Comptroller General to the Spokane, Portland & Seattle Railway Company under date of January 16, 1936. The Railway Company had protested and requested reconsideration of a decision of February 13, 1934, which disallowed a claim for 21 cents for transportation of a shipment from Los Angeles, Cal., to Pasco, Wash., under a bill of lading dated September 2, 1932. This case appears to involve the same set of facts as 3 Comp. Gen. 267 so far as concerns the line of land-grant railroad involved. The decision shows *that through rates had been cancelled via the land-grant route through Tacoma and a new line substituted in lieu of the Northern Pacific land-grant line.* The facts are therefore different from the facts presented in this case. Reference is made in the decision to the *Northern Pacific Case,* supra. It will be noted from this decision that the request for reconsideration involved the sum of 21 cents as appears at pages 614 and 615. The carrier by letter of February 21, 1934, to the Comptroller General, previous to the request for reconsideration of the decision of February 13, 1934, disallowing the claim for 21 cents, stated as follows, l. c. 615:

> As the amounts we are outstanding on these bills are so small, we are accepting your settlement as final and withdraw our claim for additional revenue. We do not, however, accept this as a precedent for any future settlements of like nature and shall insist that rates via No. Pac. Ry. be used in using that line's land

grant. These amounts have been written off our books and our file is hereby closed.

It is clear that this railroad did not acquiesce in this administrative method, practice or construction of respondent's accounting officers.

It is therefore submitted that the lower court erred in holding in its opinion that the decisions of respondent's accounting officer were applicable to the facts of this case; that this method of settlement of accounts with land-grant railroads has been acquiesced in by land-grant railroads generally for fifty years or any other period or inferentially that your petitioner has so acquiesced generally, and in employing such unsubstantiated assumption in fortification of the erroneous rule announced respecting the effect of administrative construction.

Rulings of Respondent's Accounting Officers Contradict Its Contention Here.

In connection with the above discussion respecting rulings of respondent's accounting officers, the attention of the Court is called to the following rulings which would appear to be more applicable to the facts of this case.

As found by the lower court in its opinion (R. 24), and as set out in Special Finding of Fact 4 (R. 6), the shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line of railroad or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments. Under such facts, instead of the method of settlement used by respondent's General Accounting Office in this case having been consistently and uniformly followed by respondent's accounting officers for more than fifty years in cases involving the same or similar questions, as stated by the lower court in its opinion (R. 26), the ruling of respondent's accounting officers is that the Government is not entitled to the

greater Siskiyou Route land-grant deductions as seen from the following decisions:

In *Deduction for Land Grant Where the Transportation Request Does Not Indicate The Route*, Vol. 7, Decisions of the Comptroller of the Treasury, 224, in a ruling made in November, 1900, it was held:

> *Where a transportation request does not indicate the route by which the transportation is desired*, a land-grant railroad company which furnishes the transportation via the most usually traveled of two of its routes is not subject to a deduction for land grant computed on the mileage aided on the longer route. (Italics ours.)

In *Transportation Over One of Several Land-Grant Railroads Under the Same Control*, Vol. 8, Decisions of the Comptroller of the Treasury, 474, in a decision rendered in January, 1902, it was held, l. c. 479:

> Where, with Government aid, two separate and independent lines of railroad have been constructed from a common point to entirely different points, but which subsequently by extension and independent connections are projected through a common point, and all these lines have subsequently passed to the control of a single company, and transportation is furnished between such common points for the Government by the most usually traveled of said routes, deduction for land grant should be made on the basis of such route, in the absence of a contract *or a request for transportation by the other route.* (Italics ours.)

Respondent's Contention Respecting Comparative Rates via the Siskiyou and Cascade Routes on the Water-Competitive 25 Per Cent of the Traffic is Clearly Erroneous.

Beginning at page 11 of the brief for the United States in opposition to the petition, the following is stated:

> In its report of July 1930, the Interstate Commerce Commission revoked all existing Fourth Section orders, but it established a new order giving relief

> from the long-and-short-haul provisions between San Francisco and Portland. 165 I. C. C. 373. The order, specifying a minimum clearance over the water rates and minimum earnings per ton-mile and per car-mile, did not assert that the rates authorized were confined to the Cascade route.

The statement is in error. The subject has been discussed hereinbefore, where reference is made to Special Findings of Fact 16, 17 and 20 (R. 16-19, 20-21). These findings show:

In 1920, the Fourth Section of the Interstate Commerce Act was amended by Act of Congress in which it was required that the lower rates between the ports or terminals could not be established or maintained unless shown to the Interstate Commerce Commission to be reasonably compensatory, and in connection with which it was necessary to show that the higher rates at intermediate points were reasonable rates (R. 17).

Following the 1920 amendment to the Fourth Section of the Interstate Commerce Act, the Interstate Commerce Commission reopened all previous Fourth Section authorities which had been granted your petitioner on the Siskiyou Route to meet water competition and set the case down for hearing in 1922, at which time hearings were held but the case was not decided by the Interstate Commerce Commission until 1927 (R. 17, 18). Your petitioner's presentation to the Interstate Commerce Commission in 1922 was based on the cost of operation over the land-grant line via Ashland, Oregon, on the Siskiyou Route (R. 18).

The lower rates between the ports, including Portland, Oregon, and San Francisco, California, which the Interstate Commerce Commission prescribed or permitted as reasonably compensatory in 1927, based on the cost of operation via the Siskiyou Route presented in 1922, were so much higher than the rates of the competing water lines that your petitioner could not share in the business. In other words, the Interstate Commerce Commission refused

to permit the establishment of Fourth Section rates via the Siskiyou Route sufficiently low to enable your petitioner to transport water-competitive traffic via this route in competition with the coastwise water lines (R. 18).

Because of this inability to compete with the water lines, petitioner obtained from the Commission a reopening of this decision rendered in 1927. On the new record made in 1927 and 1928, petitioner, in order to show the reasonably compensatory nature of the lower rates between the terminals, including Portland, Oregon, and San Francisco, California, based its presentation on the transportation conditions and cost of operation on the Cascade line or route, shown in solid blue on petitioner's exhibit 23, between Black Butte, California, and Springfield Juncton, Oregon, which had been completed since the 1922 hearings on the old applications or on September 1, 1926 (R. 18).

The cost of hauling freight over the Cascade line or route between Black Butte, California, and Springfield Junction, is substantially less than the cost of hauling freight over the Siskiyou route between Black Butte, California, and Springfield Junction, Oregon. The Cascade route is 24 miles shorter between these points than the Siskiyou route and substantially reduces the grades, curvatures, and operating difficulties encountered in the haul over the Siskiyou Mountains through Ashland, Medford, Grants Pass, and Roseburg, Oregon, on the Siskiyou route (R. 18).

On the record made in 1927 and 1928 based on transportation conditions existing on the Cascade route referred to, the Interstate Commerce Commission granted petitioner authority to maintain lower rates between the terminals, including Portland, Oregon, and San Francisco, California, than to intermediate points, subject to *certain minimum rates* and minimum differentials over the prevaling water rates *with a provision that computation of the minimum rates which were based on mileage should be made over the operated routes via which the rates were to be applied.* In December 1932, the Interstate Commerce Commission, in

190 I. C. C. 273, modified certain of these minimum rate provisions but *not the requirement that the rates should be based over the line of operation via which the rates applied* (R. 19).

In the report and order of the Interstate Commerce Commission entered in July 1930, 165 I. C. C. 373, all existing Fourth Section orders granted petitioner were cancelled and all existing applications of petitioner denied, which necessitated the cancellation of the lower Fourth Section terminal or port rates which petitioner had theretofore maintained in effect over the land grant line via Ashland, the Siskiyou route. In compliance with this decision of the Commission in 1930, petitioner revised the entire rate structure between California and Oregon to conform with this Fourth Section decision. The Fourth Section rates authorized by the Commission between the terminals or ports, including Portland, Oregon, and San Francisco, California, were applied over the Cascade line or route, effective November 11, 1931 (R. 19).

The rates via the Siskiyou route, including those between Portland, Oregon, and San Francisco, California, were revised effective November 11, 1931, so as to remove prohibited departures from the provisions of the Fourth Section of the Interstate Commerce Act in the rates between the terminals or ports. *Petitioner established rates via the Siskiyou route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates to, from, and between intermediate points on the Siskiyou route, which were lower than the rates theretofore found to have been reasonable on that line by the Interstate Commerce Commission.* These were the rates in effect via the Siskiyou route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by the petitioner via the Siskiyou route (R. 19, 20).

On approximately 75 per cent of the traffic transported by petitioner on the routes between Oregon and California, the lawfully published and effective tariff rates are, and have been since 1931, the same via both the Siskiyou and Cascade routes, including rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade route have been since 1931 and are now lower than via the Siskiyou route. *The petitioner sought from the time prior to 1926 to 1931 to secure authority from the Interstate Commerce Commission to put in very low rates between the terminals to compete with the water lines.* A very small percentage of freight traffic of petitioner between Portland or East Portland, Oregon, and San Francisco, California, is Government business. A substantial part of such shipments of respondent moves on rates which are the same via both the Siskiyou and Cascade routes (R. 20, 21).

It is seen from these Special Findings of Fact that your petitioner undertook to obtain from the Interstate Commerce Commission authority which would permit the establishment of rates between the ports or terminals sufficiently low via the Siskiyou Route to enable participation in this water-competitive traffic. The Commission refused to permit this. Your petitioner, being out of the business via any route, again applied to the Interstate Commerce Commission for authority to establish rates sufficiently low to enable participation in water-competitive traffic and based its presentation on the lower cost of operation via the Cascade Route. The Interstate Commerce Commission in substance found that lower rates via the Cascade Route than it would authorize for application via the Siskiyou Route would be reasonably compensatory. The orders in 165 I. C. C. 373, July, 1930, and 190 I. C. C. 273, December, 1932, prescribed certain minimum rates, that is, rates lower than which could not be lawfully established. This was done by specifying minimum earnings per ton-mile and per

car-mile. Both orders required that the rates should be based over the line of operation via which the rates applied. It has already been noted that the Commission refused to authorize these lower rates based on cost of operation via the Siskiyou Route. As seen from the report of the Commission, 165 I. C. C. 373, 382, decided July 10, 1930, the presentation was based on cost of operation via the Cascade Route, as found in the Special Findings of Fact referred to. It is obvious, therefore, that your petitioner could not obtain the required minimum earnings from such Fourth Section rates applied via the substantially more costly operated Siskiyou Route. Respondent is in error in contending that such Fourth Section rates were not confined to the Cascade Route by the Interstate Commerce Commission.

It is also contended by respondent that your petitioner points to nothing to show that the order of the Commission compelled the differential established November 11, 1931. The Special Findings of Fact of the lower court show that the lower Fourth Section rates were granted by the Commission via the Cascade Route and were denied for application via the Siskiyou Route and also show that the rates established by your petitioner via the Siskiyou Route, when the revision was compelled by the Interstate Commerce Commission's denial of all outstanding Fourth Section relief, were lower than the Commission had previously found to be reasonable for application via the Siskiyou Route. The Government as well as any shipper has no right to rates less than reasonable maximum rates. But here your petitioner established rates less than reasonable maximum rates and maintains such rates via the Siskiyou Route. Furthermore, if at any time there is any question respecting the reasonableness of any rate or rates in effect via the Siskiyou Route, the respondent as well as any other shipper has recourse to the Interstate Commerce Commission under the provisions of the Interstate Commerce Act to have an appropriate reduction in such rate or rates ordered.

Certain Decisions Cited by Respondent Have No Application to the Facts of this Case.

In *Southern Pacific Company* v. *United States,* 272 U. S. 445, the railroad had no tariff for the service rendered filed with the Interstate Commerce Commission available to the public at large but had filed a special tariff for the Government, in such cases, without land-grant deductions. It was held that no contract of the United States to pay the special tariff rate could be implied from the fact that the shipments were made when the special tariff was the only one applicable on file, in the absence of proof that the contracting officers then knew of that tariff. It was further held that the special tariff was filed without statutory authority and hence the officers were not chargeable, as a matter of law, with knowledge of it. The decision has no application whatever to the facts of this case. Lawfully published and effective commercial tariff rates available to the general public via both the Siskiyou and the Cascade Routes are the only ones presented here for consideration or mentioned in the Special Findings of Fact of the lower court. There is no special tariff rate for any purpose here involved.

In *Chicago, St. P. M. & O. Ry. Co.* v. *United States,* 217 U. S. 180, this Court held that land-grant deductions for the transportation of the mails could be made for operation over an additional track constructed on land-grant right of way. This Court held that the service that the Government reserved was coextensive with the road as constituted under the grant. There is no such set of facts here involved. As seen from previous discussion herein and the Special Findings of Fact of the lower court, the Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service, etc.

Reference is made to the decision of this Court in *Chippewa Indians of Minnesota* v. *United States,* 59 Sup. Ct.

Rep. 313, apparently as reversing all previous decisions on the subject and authorizing a general use of almost any kind of information in an opinion of the Court of Claims although not of record, mentioned or referred to in the Special Findings of Fact and, in part, conflicting therewith. We do not so construe this decision. The decision simply holds, l. c. 315:

> The findings do not show as clearly as might be desired that the timber was without merchantable value in 1908. However, there is a complete absence of any controversy on this point, and appellants were not denied the right to introduce evidence to establish the value of the property. When these findings are considered with the pleadings and are clarified by the opinion of the court below, all possible doubt as to their meaning disappears, and they show that the Court found a lack of any merchantable value in 1908.

The decision has no application to the facts of this case. There is no need of resorting to the opinion of the lower court to clarify or ascertain the meaning of any of the Special Findings of Fact.

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the cause ordered remanded to such court, with direction to enter judgment for your petitioner, plaintiff below, in the sum of $116.31.

Respectfully submitted,

JAMES R. BELL,
Counsel for Petitioner.

APPENDIX A.

Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)

Act of May 23, 1928, 45 Stat. 722-723, Chap. 720, enacted:

> That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided*, That the Congress hereby reserves the right at any time by law to prescribe such charges at it deems advisable for such Government transportation.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 24 1939
CHARLES ELMORE CROPLEY
CLERK

No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1938

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

Burke v. *Southern Pacific R. R. Co.*, 234 U. S. 669 — 9

Chicago, St. Paul, etc., Ry. Co. v. *United States*, 217 U. S. 180 — 8

Louisville & Nashville R. R. Co. v. *United States*, 267 U. S. 395 — 9

Louisville & Nashville R. R. Co. v. *United States*, 273 U. S. 321 — 9

Minnesota v. *United States*, No. 73, present Term, decided January 3, 1939 — 10

Southern Pacific Co. v. *United States*, 237 U. S. 202 — 9

Southern Pacific Co. v. *United States*, 272 U. S. 445 — 9

United States v. *Northern Pacific Ry. Co.*, 256 U. S. 51 — 9

United States v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, rehearing denied, 32 F. (2d) 698 — 8, 10

Statutes:

Act of July 1, 1862, c. 120, 12 Stat. 489, 493:
Sec. 6 — 13

Act of March 3, 1863, c. 98, 12 Stat. 772, 773:
Sec. 3 — 14

Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241:
Sec. 5 — 13

Act of July 27, 1866, c. 278, 14 Stat. 292, 295, 297:
Sec. 5 — 15
Sec. 11 — 15

Act of June 7, 1924, c. 291, Title I, 43 Stat. 477, 486 (U. S. C., Title 10, Sec. 1375) — 15

Act of May 23, 1928, c. 720, 45 Stat. 722–723 — 14

Miscellaneous: Page

5 Comp. Dec. 364 ..... 7, 8
17 Comp. Dec. 633 7
21 Comp. Dec. 238 7
24 Comp. Dec. 193 7
3 Comp. Gen. 267 7
10 Comp. Gen. 552 7
15 Comp. Gen. 614 7
3 Dig. Dec. 2d Comp. 299 7
4 Dig. Dec. 2d Comp. 99 No. 283 7
Report and Order of Interstate Commerce Comm., 165 I. C. C. 373 11
Senate Rep. No. 698, 70th Cong., 1st Sess., p. 1 6

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22–29) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1938 (R. 29). A motion for a new trial was overruled November 14, 1938 (R. 30). The petition for a writ of certiorari was filed January 24, 1939 (R. 30). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Where a company having a through line of railway between two points which is subject to land-grant deductions, establishes an alternate through route by combining parts of the old land-grant line with new lieu lines constructed without land-grant aid, should the Government's land-grant deduction from the rate for through shipments be based upon the land-grant mileage in the original line, or, as petitioner contends, upon the land-grant mileage actually used in the new alternate route.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

The special findings of fact made by the court below (R. 5–22) may be summarized as follows:

In 1887, the petitioner completed a through line of railway between Portland, Oregon, and San Francisco, California, and established through rates over that line between those points (R. 16). The length of that line was 774.86 miles, of which 663.16 miles had been granted to the railroad under Acts of Congress and were subject to land grant deductions (R. 8–9).

In 1926, the petitioner completed the construction of the second of two cut-offs which constituted alternate or lieu lines between points on the original line (R. 13–15). As a result of the cut-offs, the

distance between Portland, Oregon, and San Francisco, California, was reduced to 725.03 miles, of which 258.13 miles was mileage in the original route, subject to land-grant deductions (R. 7).

The purpose of the construction of the cut-offs was the development of local traffic, and the completion of an alternate or lieu line over which traffic could be moved more economically (R. 13–15).

The petitioner thereupon organized two routes between Portland and San Francisco, the first of which, called the Siskiyou route, was the original line completed in 1887; and the second route, called the Cascade route, consisted of the cut-offs which were completed in 1926 and of part of the original line (R. 15). After the two routes were constructed, the petitioner issued instructions to route through shipments over the Cascade route for reasons of economy, and thereby 1,275,000 tons of south-bound and 250,000 tons of north-bound traffic were diverted yearly from the Siskiyou route (R. 16). The petitioner's scheduled train service included two manifest or through freight trains south-bound and one north-bound in addition to local service daily over the Cascade route. Over the Siskiyou route there was only one local freight train each way daily (R. 16).

From the date of the organization of the Cascade route until November 1931, the rates over the two routes were identical (R. 20). Effective November 11, 1931, the petitioner, with the permission of the

Interstate Commerce Commission, revised the through rates between Portland and San Francisco (R. 19). For shipments between those points, the through rates charged private parties over the Cascade route were lower than those for the Siskiyou route on approximately 25 per cent of the freight traffic transported by petitioner (R. 11, 20–21).

Prior to the rate revision of November 11, 1931, the petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of the respondent, who was in charge of routing Government freight, that it proposed to apply the new rates to Government shipments, and advised the Coordinator that the Government might use either the Siskiyou or the Cascade route, and that the Government's routing with respect to either line would be followed[1] (R. 20).

In December 1931 and January 1932 the petitioner transported numerous shipments on Government bills of lading between Portland and San Francisco. Those shipments were unrouted by the

---

[1] The petitioner contended that while the Goverment was entitled to a deduction of 42.792 per cent of the traffic rate over the Siskiyou route, based upon the proportion of line subject to land-grant deductions, as compared with the total length of the haul, it was entitled to a deduction of only 17.801 per cent from the rates for the Cascade route, on the ground that the deduction should be determined solely with respect to the new route, and be based upon the proportionate mileage subject to land-grant deductions as compared with the total length of the haul in the new route.

respondent[2] (R. 6). The petitioner assessed charges for the shipments based upon the lowest tariff rate applicable to the Cascade route less a land-grant deduction of 17.801 per cent. The respondent's accounting officers, on the other hand, made payments to the petitioner by deducting from the tariff rate on the Cascade route the land-grant deduction of 42.792 per cent, which was the land-grant deduction employed in the original line between Portland and San Francisco (R. 12).[3]

On April 4, 1933, the petitioner filed suit in the Court of Claims asking judgment for the difference between the sums paid under the various settlements of the accounting officers and the amounts claimed by it in its various bills (R. 1–4). The court below held that the petitioner was not entitled to recover, and dismissed the petition (R. 29). Thereafter a motion for new trial was overruled (R. 30).

ARGUMENT

The petitioner appears to urge two errors in the judgment of the court below: (1) That the court misconstrued the statutes determining its land-

[2] As a matter of fact, the petitioner transported those shipments over a third combination of its lines for which no through tariffs were published (R. 21), and which included more land-grant mileage than the Cascade route, amounting to 24.182 per cent of the total haul (R. 10).

[3] There were also shipments between East Portland and San Francisco (R. 6), with respect to which the Government claimed a deduction of 42.831 per cent, and the petitioner conceded a deduction of only 17.819 per cent.

grant deduction obligation; and (2) that the judgment is not supported by the special findings, but only by the opinion of the court below which relies in part on facts outside of or in conflict with the special findings.

1. The United States is required to pay for transportation of its property over petitioner's land-grant lines only 50 per cent of the charge for like transportation performed for the public at large.[4] The Government, through its officers, directed and required the petitioner to transport through shipments between San Francisco, California, and Portland, Oregon. The question is as to the proportion of the 50 per cent deduction available to the United States on through shipments moving over this through railway route originally subject to land-grant deductions and now composed in part

[4] The Act of July 25, 1866, *infra*, p. 13, provided that the property of the United States should be transported free of charge between Roseville, California, and East Portland, Oregon, when required by the Government of the United States. However, the Act of May 13, 1928, *infra*, p. 14, in order to remove the discrimination between petitioner and other land-grant railroads which were paid on Government traffic 50 per cent of the published tariff rates, provided that the railroad between East Portland and Roseville should receive compensation for transportation of property of the United States at the same rate as is paid other land-grant railroads. See Senate Rep. No. 698, 70th Cong., 1st Sess., p. 1. The Act of June 7, 1924, *infra*, p. 15, with respect to land-grant railroads, provided that they should be paid, for the transportation of United States property, at rates not exceeding 50 per cent of the rates for like transportation performed for the public at large.

of new lines not so subject. Petitioner contends that the Government is entitled to a proportion of its 50 per cent deduction based on the ratio of aided mileage *actually and presently employed* in the through rate to the total mileage thereof. The Government submits that this proportion should be based on the ratio of aided to total mileage *in the original line* between these termini.

This latter method of settlement has been followed by the respondent's accounting officers since April 17, 1888, when it was held that:

> If a railroad have a line between two points aided in whole or in part, and subsequently acquire a new line or lines, nonaided, between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line. (3 Dig. Dec. 2d Comp. 299.)

In conformity with the foregoing decision this method of settlement has been followed by the accounting officers of the Treasury Department and the General Accounting Office in numerous reported decisions involving the same or similar questions. 4 Dig. Dec. 2d Comp. 99 (No. 283) (1894); 5 Comp. Dec. 364 (1899); 17 Comp. Dec. 633 (1911); 21 Comp. Dec. 238 (1914); 24 Comp. Dec. 193 (1917); 3 Comp. Gen. 267 (1923); 10 Comp. Gen. 552 (1931); 15 Comp. Gen. 614 (1936). It may be noted that in one of the earliest rulings this prin-

ciple was applied with respect to the transportation of an employee of the Government by the Southern Pacific Co. from Sacramento to San Francisco via Benicia, the shortest and cheapest route, rather than via Stockton and over aided road. 5 Comp. Dec. 364, 365 (1899).

The method of settlement was specifically approved by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Ry. Co.* (1929), 30 F. (2d) 655, rehearing denied, 32 F. (2d) 698. There, as in the instant case, a railway constructed alternate lines to shorten its route and effect operating economies, and maintained only local service over the original land grant line, available at a higher rate (p. 660). The court held the railway could not, by subsequent construction of cut-offs and withdrawal of through service, deprive the United States of its right to deductions from the through rate on the basis of the land grant ratio established when the railroad was first constructed.

The decisions of this Court support the view that the privilege of the Government with respect to the transportation between stations on land-grant lines is not diminished by the utilization of cut-offs on the route. Thus in *Chicago, St. Paul, etc., Ry. Co.* v. *United States*, 217 U. S. 180, 188, although the statute did not in terms require the railway to build more than a single track, it was held that the Government's right to service was co-extensive with the road as constituted under the grant, and at-

tached to additional tracks used between the terminals. The land grant act constitutes a contract (*Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64) under which part of the railway's compensation has been paid in advance in land and the balance in money. *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395, 402. In its turn, the United States is entitled to service equal to that enjoyed by the public at stated lower rates. *Southern Pacific Co.* v. *United States*, 237 U. S. 202; *Louisville & Nashville R. R. Co.* v. *United States, supra; Louisville & Nashville R. R. Co.* v. *United States*, 273 U. S. 321.

The higher through rate on the Siskiyou route—on which, indeed, there is no through freight service, but only local service (R. 16)—is an artificial concept amounting indirectly to a special tariff applicable to Government shipments (compare *Southern Pacific Co.* v. *United States*, 272 U. S. 445), and can not affect the advantage over private shippers for which the Government paid consideration in grants of land. Compare *Southern Pacific Co.* v. *United States, supra*, 237 U. S. 202, where the Court rejected the railway's contention that because of the Government's increased advantage from Roseville Junction to Portland, the lowest through rate between San Francisco and Portland could not be proportionately applied by the Government, instead of local rates, to the non-aided stretch between San Francisco and Roseville.

2. There is no merit to any of petitioner's contentions with respect to the insufficiency of the findings of fact. Obviously, the court below was justified in looking to the published administrative practice for aid in the construction of the laws, and without making specific findings of fact of the existence of such a practice. Compare *Minnesota* v. *United States*, No. 73, this Term, decided January 3, 1939. Likewise, it was entitled to refer to the *ratio decidendi* of the opinion in *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655. The reference to the acquiescence by the railroads (R. 27) is not vitiated, as petitioner suggests (Pet. Br. 15) by the fact that in new situations the railroads protested the application of the prior rulings, so that new rulings were evoked. And the railroads certainly acquiesced in the rulings in the sense that no litigation was ever instituted by any of them, save for the Northern Pacific Ry. Co., which admitted the prior acquiescence, and the present petitioner.

Petitioner objects to certain statements as inconsistent with the findings. The statement that the rates over the Siskiyou route were excessive (R. 29) was not intended to suggest that they were unlawfully high, but merely that they exceeded the rates on the Cascade route and would prompt shippers to use the latter.

Objection is also made (Pet. 12) to the statement in the opinion below (R. 25) that petitioner secured authority to increase the existing rates

over the Siskiyou route and to reduce the rates over the Cascade route. In the first place the statement is wholly immaterial, since the Government's right to take the original proportion of deductions after using the route as determined by the cut-offs is not affected by the reason for the use of such route, whether for purposes of service or rate, or by the consideration whether the railway was compelled or merely permitted to increase the rate on the original route. Whenever a railroad has a new line between two points on aided road, the case is one for the application of the principle referred to (pp. 7–9), as stated in the accounting rulings (see especially 17 Comp. Dec. 633), in the *Northern Pacific* opinion, and in the opinion below. But in any event the findings of fact below (R. 16–20) neither contradict the statement in the opinion, nor support petitioner's suggestion that the disparity in rates between the two routes was compelled by law (Pet. 5, 12). They show that from September 1, 1926, to November 10, 1931, the port-to-port rates were the same over both routes (R. 20), and that petitioner continued to seek a lower through rate (R. 18). In its report of July 1930, the Interstate Commerce Commission revoked all existing Fourth Section orders, but it established a new order giving relief from the long-and-short-haul provisions between San Francisco and Portland. 165 I. C. C. 373. The order, specifying a minimum clearance over the water rates and minimum earnings per ton-mile and per car-

mile, did not assert that the rates authorized were confined to the Cascade route. Petitioner revised its rate structure effective November 11, 1931, and increased the port-to-port rates over the Siskiyou route (R. 20), but while the order permitted petitioner to file these rates, petitioner points to nothing to show that the order compelled the differential established by petitioner.

CONCLUSION

The decision of the court below was correct, and there exists no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT H. JACKSON,
Solicitor General.

SAM E. WHITAKER,
Assistant Attorney General.

PAUL A. SWEENEY,
Special Assistant to the Attorney General.

LEAVENWORTH COLBY,
Attorney.

FEBRUARY 1939.

APPENDIX

Act of July 1, 1862, c. 120, 12 Stat. 489, 493, providing for the construction of petitioner's line from San Francisco to Roseville, California:

> SEC. 6. *And be it further enacted,* That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) * * *.

Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241, providing for the construction of petitioner's line from Roseville, California, to East Portland, Oregon:

> SEC. 5. *And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by

any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Act of May 23, 1928, c. 720, 45 Stat. 722–723, enacted:

That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided*, That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation.

Act of March 3, 1863, c. 98, 12 Stat. 772, 773:

SEC. 3. *And be it further enacted*, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads and

branches shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

Act of July 27, 1866, c. 278, 14 Stat. 292, 295, and 297:

SEC. 5. * * * *Provided,* That the said company shall not charge the government higher rates than they do individuals for like transportation * * * service.

* * * * *

SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

Act of June 7, 1924, c. 291, Title I, 43 Stat. 477, 486 (U. S. C., Title 10, Sec. 1375), providing for payment to land-grant railroads for transporting property of the United States:

* * * *Provided,* That hereafter payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant Acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of

the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant Acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service. * * *

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 29 1939
CHARLES ELMORE CROPLEY
CLERK

No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1938

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	7
Argument	11
I. The obligation of the contract	14
II. The administrative construction of the statutes	18
III. The practical construction of the parties	26
IV. The rate orders of the Interstate Commerce Commission	31
Conclusion	37
Appendix	38

CITATIONS

Cases:	
Atchison R. R. Co. v. *United States*, 15 C. Cls. 126	12
Insurance Co. v. *Dutcher*, 95 U. S. 269	26
Lake Superior & Miss. R. R. Co. v. *United States*, 93 U. S. 442	12, 14, 15
L. & N. R. R. v. *United States*, 273 U. S. 321	21
Louisville & Nashville R. R. Co. v. *United States*, 267 U. S. 395	16
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100	26
Securities & Exchange Com'n v. *Robert Collier & Co.*, 76 F. (2d) 939	30
Southern Pac. Co. v. *United States*, 272 U. S. 445	37
Southern Pac. Co. v. *United States*, 237 U. S. 202	12, 37
Swendig v. *Washington Co.*, 265 U. S. 322	24
United States v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, rehearing denied 32 F. (2d) 698	8, 21, 22, 24, 25, 27
United States v. *Shreveport Grain and El. Co.*, 287 U. S. 77	24
United States v. *U. P. R. R.*, 28 I. C. C. 518	32
Wisconsin v. *Illinois*, 278 U. S. 367	24
Statutes:	
Act of March 3, 1863, c. 98, 12 Stat. 772, 773	40
Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241	14, 25, 29, 38
Act of July 27, 1866, c. 278, 14 Stat. 292, 297	41
Act of May 23, 1928, c. 790, 45 Stat. 722–723	12, 13, 29, 40

137058—39——1

Miscellaneous:

	Page
5 Comp. Dec. 364 (1899)	19
7 Comp. Dec. 224 (1900)	25
8 Comp. Dec. 474 (1902)	26
17 Comp. Dec. 633 (1911)	19
21 Comp. Dec. 238, 239 (1914)	20
24 Comp. Dec. 193, 194 (1917)	20
3 Comp. Gen. 267, 268	23
10 Comp. Gen. 552, 554 (1931)	20
15 Comp. Gen. 614 (1936)	20, 22
3 Dig. Dec. 2d Comp. 299	19
Hearing on H. R. 10162, March 31, 1928	28
Hearing on H. R. 10162, March 31, 1928, Statement of Representative W. C. Hawley, p. 33	29
House Rep. No. 1538, 70th Cong., 1st sess	30
22 I. C. C. 366	32
24 I. C. C. 34	32
129 I. C. C. 3	32, 35
165 I. C. C.:	
373	10, 33
382	34
396–397	36
410–413	33
173 I. C. C. 577	35
190 I. C. C.:	
273	35
274	35
Senate Rep. 698, 70th Cong., 1st Sess., p. 1	13, 29

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 22–29) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1938 (R. 29). A motion for a new trial was overruled November 14, 1938 (R. 30). The petition for a writ of certiorari was filed January 24, 1939 (R. 30), and was granted March 6, 1939. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner has a through line railroad, on which government transportation rates are subject to land-grant deductions; it established an alternate through route, upon which lower rates are charged, by combining parts of the old land-grant line with new cut-offs or lieu lines constructed without land-grant aid. The question is whether the Government's land-grant deduction from the lower rate for through shipments should be based upon the land-grant mileage in the original line, or upon the land-grant mileage used in the new alternate route.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 38–41.

STATEMENT

The special findings of fact made by the court below (R. 5–22) may be summarized as follows:

In 1887, the petitioner completed a through line of railway between Portland, Oregon, and San Francisco, California, and established through rates over that line (R. 16). The length of that line was 774.86 miles, in aid of 663.16 miles of which lands had been granted to the railroad under Acts of Congress, so that rates were subject to land-grant deductions (R. 8–9).

In 1926, the petitioner without the aid of land grants completed the construction or acquisition of a series of lines which when joined constituted

alternate or lieu lines between points on the original line (R. 13–15). The distance between Portland and San Francisco, along these alternate lines, was reduced by about 50 miles to 725.03 miles, of which 258.13 miles was mileage in the original route, subject to land-grant deductions (R. 7).

The purpose of the construction or acquisition of the new lines was the development of local traffic, and the completion of an alternate or lieu line over which traffic could be moved more economically (R. 13–15).

The petitioner thereupon organized two routes between Portland and San Francisco, the first of which, called the Siskiyou Route, was the original line completed in 1887; and the second route, called the Cascade Route, consisted of the lines which were completed in 1926 and of parts of the original line (R. 15). After the two routes were constructed, the petitioner issued general instructions to route through shipments over the Cascade route for reasons of economy; thereby 1,275,000 tons of south-bound and 250,000 tons of north-bound traffic were diverted yearly from the Siskiyou route, although certain shipments were routed over the Siskiyou route, under Cascade tariffs, for reasons of economic handling of traffic. The petitioner maintained no through freight service over the Siskiyou route. Its scheduled daily train service included two manifest or through freight trains south-bound and one north-bound, in addition to local service,

over the Cascade route. Over the Siskiyou route there was only one local freight train each way daily between Black Butte, California, and Springfield, Oregon, the meeting points of the two routes; there is no finding as to any other service, either local or through, on that route (R. 16).

From the date of the organization of the Cascade route on September 1, 1926, until November 1931, the rates over the two routes were identical (R. 20). Effective November 11, 1931, the petitioner revised the through rates between Portland and San Francisco (R. 19).

This revision followed prolonged proceedings before the Interstate Commerce Commission. Since 1912 petitioner, in order to meet water competition, had very low through rates between San Francisco and Portland. In 1920 the Interstate Commerce Act was amended to require that such rates be reasonably compensatory. The Commission reopened its earlier proceedings in 1922 and in 1927 allowed lower port-to-port than intermediate rates; the intermediate rates were not to be more than 100 per cent higher than the through rates. The proceedings were again reopened because petitioner felt the rates to be too high to meet water competition; petitioner, to show that lower rates were compensatory, based its presentation on the transportation costs of the Cascade route; these costs, because the route is shorter and with fewer grades and sharp curves, are

substantially less than over the Siskiyou route. In 1930 the Commission allowed lower port-to-port rates, to be computed on a mileage basis. Petitioner on November 11, 1931, revised its entire rate schedule (R. 18–20).

On about 75 percent of the traffic, the through rates remained the same over both routes. On the 25 percent water competition traffic, which included the shipments involved in this case, through rates over the Cascade route were reduced to the minimum allowed by the Commission order and over the Siskiyou route the through rates were raised to a point approximately double what they had been before, and equivalent to the maximum of 100 percent permitted intermediate rates over the lowest through rates (R. 20–21).

Prior to the rate revision of November 11, 1931, the petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of the respondent, who was in charge of routing Government freight, that it proposed to apply the new rates to Government shipments, and advised the Coordinator that the Government might use either the Siskiyou or the Cascade route, and that the Government's routing with respect to either line would be followed [1] (R. 20).

---

[1] The petitioner contended that while the Government was entitled to a deduction of 42.792 percent of the traffic rate over the Siskiyou route, based upon the proportion of line subject to land-grant deductions, as compared with the total length of the haul, it was entitled to a deduction of only

In December 1931 and January 1932 the petitioner transported numerous shipments on Government bills of lading between Portland and San Francisco. Those shipments were unrouted by the respondent (R. 6). The petitioner assessed charges for the shipments based upon the lowest tariff rate applicable to the Cascade route less a land-grant deduction of 17.801 percent.[2] The respondent's accounting officers, on the other hand, made payments to the petitioner by deducting from the tariff rate on the Cascade route the land-grant deduction of 42.792 percent, which was the land-grant deduction employed in the original line between Portland and San Francisco (R. 12).[3]

On April 4, 1933, the petitioner filed suit in the Court of Claims asking judgment for the difference between the sums paid under the various settle-

---

17.801 percent from the rates for the Cascade route, on the ground that the deduction should be determined solely with respect to the new route, and be based upon the proportionate mileage subject to land-grant deductions as compared with the total length of the haul in the new route. The Cascade rates, even with this small deduction, were lower than the Siskiyou rates with the larger deduction (R. 11).

[2] As a matter of fact, the petitioner transported those shipments over a third combination of its lines for which no through tariffs were published (R. 21), and which included more land-grant mileage than the Cascade route, amounting to 24.182 percent of the total haul (R. 10).

[3] There were also shipments between East Portland, 0.7 mile from Portland, and San Francisco (R. 6), with respect to which the Government claimed a deduction of 42.831 percent, and the petitioner conceded a deduction of only 17.819 percent.

ments of the accounting officers and the amounts claimed by it in its various bills (R. 1–4). The court below held that the petitioner was not entitled to recover, and dismissed the petition (R. 29). Thereafter a motion for new trial was overruled (R. 30).

SUMMARY OF ARGUMENT

By the Act of June 25, 1866, petitioner was obligated to transport troops and property of the respondent free of charge between the towns of East Portland, Oregon, and Roseville, California, as consideration for the grant of land with which to aid the railroad construction between these points. Its obligations were reduced by the Act of May 23, 1928, which provided that petitioner should be paid 50 per cent of the published tariff rates over its line.

I

The 1866 Act provides that Government property and troops "shall be transported over said road" at the cost of the company; the 1928 Act speaks of "the land grant railroad * * * operated between * * * East Portland * * * and Roseville." Since Roseville is the junction through which the shipments involved in fact moved, the 1928 Act equally with the 1866 Act support the terminal-to-terminal construction of the contract.

Plainly enough, when the United States granted to petitioner lands in aid of the construction of its

railroad it wished to receive, not the meaningless privilege of free transportation over one particular line of rails, but the practical benefit of free transportation between the designated terminals, no matter which route should be used by the railroad. The modification in the contract made by the Act of 1928 merely reduced the benefit to which the United States was entitled; it was not intended in addition to amount to a waiver of the right of the Government to the most economical use of the railroad lines between the terminals.

II

As long ago as April 17, 1888, the Comptroller of the Treasury ruled that the construction of a new line without Government aid between two points in place of a line constructed with Government aid did not alter the proportionate deduction to which the Government was entitled over the original line. This rule has become settled through a series of administrative rulings extending up to the present time. Two rulings of the Comptroller of the Treasury in 1900 and 1902, relied upon by petitioner, were confined to situations where the alternative lines were constructed by independent railroads to different points, and only subsequently projected to a second common point and brought under common control. The settled administrative construction has specifically been approved in *United States* v. *Northern Pacific Railroad Co.*, 30 F. (2d) 655 (C. C. A. 8th).

III

Not only have the controlling statutes received a settled administrative construction, but the practical interpretation placed upon the contract by the parties require that petitioner's present contention be rejected. The settled practice of respondent's accounting officers has almost uniformly been acquiesced in by the carriers, as is demonstrated by the fact that only one other suit has been instituted to challenge the Comptroller's rulings. And even in the case of the particular petitioner here, there has been a long period in which it has accepted this administrative construction. From September 1, 1926, the date of the completion of the Cascade route, to November 11, 1931, the petitioner submitted its vouchers on the basis of the full land grant deduction allowed over the original Siskiyou route. Since, during this period, it had issued instructions to route through traffic over the Cascade route, it reasonably follows that the Government shipments were transported over the Cascade route. In addition, the representative of petitioner who appeared before the Congressional committee which was considering the 1928 Act, stated that if petitioner received the benefit of that Act, and became a 50 per cent line, "of course the Government will have the choice of either of these routes at 50 per cent."

IV

Petitioner urges that it is under no obligation to apply the original proportion because the Interstate Commerce Commission refused to allow a reduction in the rates over the Siskiyou route comparable to the Fourth Section relief given on transportation between the ports over the Cascade route. The contention is unfounded.

Even if the Commission had refused to allow lowered Siskiyou rates, petitioner's land grant obligations are not eliminated on any such primitive theory of retaliation; the land grant obligations and the duties arising out of the Interstate Commerce Act are wholly independent congeries of the relationships.

But, in point of fact, the Commission did not refuse permission for the lowered rates to be applied over the Siskiyou route. There is nothing in the opinion of the Commission (165 I. C. C. 373) to indicate so improbable a result as extending relief to one but not the other of the alternative routes. There are numerous indications in the opinion of the Commission, and in its interpretation by petitioner as applicable in other respects to the Siskiyou route, which forbids the interpretation adopted in this case by petitioner. It results that petitioner could have applied the Fourth Section relief to the Siskiyou route; since the minimum rates were computed upon a mileage basis, this would indicate a compulsory differential of only about 6.5 per cent

instead of the 100 per cent differential instituted by petitioner.

But, even if petitioner could escape its land grant obligations because of the order of the Commission, and even if this order was in truth applicable only to the Cascade route, there was yet no compulsion upon petitioner to place its intermediate rates over the Siskiyou route at a figure which was double the through Cascade rate.

In result, the conclusion seems inescapable that the Siskiyou route is maintained as a through route only on paper, for the purpose of eliminating a substantial portion of the advantage over private shippers which petitioner had contracted to give the Government.

ARGUMENT

That part of the Siskiyou route which extends between the towns of East Portland, Oregon, and Roseville, California, was constructed with the aid of land grants. The Act of June 25, 1866, *infra*, p. 38, which authorized the granting of certain lands to aid in the construction of the road between East Portland, Oregon, and some point on the Central Pacific Railroad in Sacramento Valley, California, stated that the purpose of the grant was "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad." The terms of this Act, which Act constitutes the contract, require that the petitioner should keep the line in

repair and use, that the Government should be entitled to preference in the use of the line, that it should be free of all tolls or charges upon the transportation of property and troops of the United States, and that the property or troops of the United States should be transported over the line at the cost of the company operating it. The petitioner operated under this contract until May 23, 1928, during which time it transported troops and property of the United States between Portland and Roseville without cost to the United States. *Southern Pacific Co.* v. *United States,* 237 U. S. 202. In that respect the Act here involved differs from those Acts which provide that the United States shall have the free use of the road only, such as the one involved in the case of *Lake Superior & Miss. R. R. Co.* v. *United States,* 93 U. S. 442. There it was held that while the United States had the right to the free use of the line, it must pay the cost of the transportation. That cost was established in the case of *Atchison R. R. Co.* v. *United States,* 15 C. Cls. 126, to be 50 per cent of the ordinary tariff rates for private transportation, and that percentage has since been applied as a reasonable rate for the cost of the haul. The value of the use of the road has been considered to constitute the remaining 50 per cent.

By the Act of May 23, 1928, *infra,* p. 40, Congress provided that the land-grant railroad operated between East Portland, Oregon, and Roseville, Cali-

fornia, should be paid the same rate, namely, 50 percent of the published tariff rates, as is paid to certain other land-grant railroads organized under certain prior acts. Senate Rep. No. 698, 70th Cong., 1st Sess., p. 1. The net result of the Act of May 23, 1928, was to make the petitioner's line a 50 percent land-grant line (R. 9) in place of a free land-grant line which it had been.

Prior to May 23, 1928, the contract between the parties required the carrier to carry the goods and troops of the United States free of charge between Portland and Roseville. The consideration which the United States was to receive consisted of the transportation of the goods from one point to another, and not the route or means by which it was transported. Thereafter, the contract between the parties required such transportation for 50 percent of that charged private shippers; but the contract was still for the transportation, and not the route or means by which it was performed. At that time Congress had before it the history of the land-grant line, the manner in which it was being operated in conjunction with the cut-offs which now comprise part of the Cascade route and the rates then being paid for transportation irrespective of which route was used. In the light of those circumstances, the reasonable obligation of the contract as modified, the long continued administrative construction, and the practical interpretation which the parties themselves placed upon the contract, we believe that the

United States was entitled to a land-grant deduction in the through terminal rates, no matter which route was used, proportional to the land-grant mileage constructed in the original route between East Portland, Oregon, and Roseville, California.

I

THE OBLIGATION OF THE CONTRACT

Petitioner (Br. 20–23) insists that its contract with the Government is clear and unambiguous, and that it cannot be construed in the light of any evidence beyond the words of the statute alone. In this connection it emphasizes that it has fulfilled all the obligations imposed upon it by that contract (Br. 12–19). It should narrow the field of controversy if we agree at the outset that an "unambiguous" contract needs no external aid to its construction (cf. *Lake Superior & Miss. R. R. Co.* v. *United States, supra,* p. 444) and that petitioner has in no way breached its contract (except, of course, so far as it has submitted transportation vouchers which are too high).

Petitioner, however, nowhere explains why the Act of July 25, 1866, *infra,* as amended by the Act of May 23, 1928, *infra,* is supposed to be clear and unambiguous. The 1866 Act provides that the "railroad" should be free of all toll on government transportation and that government property and troops "shall be transported over said road" at the cost of the company. Advocates could debate end-

lessly as to whether this refers to transportation between designated terminals or over particular segments of railroad, or, indeed, what was meant by the term "railroad" (see *Lake Superior & Miss. R. R. Co.* v. *United States, supra*). There is equal room for debate in the 1928 Act, enacted after completion of the alternative Cascade route. It rather plainly contemplates the terminal-to-terminal interpretation, in speaking of "the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California." It is true that Roseville is on the Siskiyou but not the Cascade route. But, as shown by Exhibit 23 (made a part of the findings, R. 7), Roseville is the junction with the eastern lines of petitioner and is the end of the land-grant mileage from Portland to San Francisco; all of the shipments involved in this case, nominally routed over the Cascade route, in truth followed the Siskiyou route from Tahama to Roseville (R. 21), where, one supposes, full trains for San Francisco were made up with cars coming over the eastern lines.

However, even if the particular words used in the statutes were unequivocally to support petitioner, as they do not, the contract must still, in the light of its purpose, be construed to insure the full land-grant deduction, whatever alternative route petitioner chooses to construct and use between

the terminals. The grant of land in aid of the construction of the railroad over which troops and property of the United States were to pass, either free or at a reduced tariff, constituted a prepayment on the part of the United States for the future transportation which it might require. When the line between East Portland and Roseville was completed, the United States had paid in advance for all future transportation of its property and troops between those points. Cf. *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395, 402. The practical benefit which the United States was to obtain for its contribution was transportation of its troops and property between certain points, and not the meaningless privilege of free or cheaper transportation of its troops and property over one particular line of rails.

Prior to the 1928 amendment, it was immaterial what shorter or cheaper routes existed. The United States was entitled to free transportation between the terminals, and there was no reason to inquire as to which route was used. There is no reason to believe that a contract benefit, then applicable indifferently to either route, was, by virtue of its gratuitous modification in favor of petitioner, made applicable to one route only. The Act of 1928 altered the benefit to which the United States was entitled only with respect to the amount of that benefit; it was entitled before to free transportation, and thereafter it was entitled to transportation at 50 per cent of the published tariff.

At the time of its construction petitioner was the only railroad between East Portland, Oregon, and Roseville, California. A fair inference is that the parties supposed it would constitute the main line between those points, that the rate over that line would constitute the lowest through rate between the terminals, and that traffic routed over that line would receive not only the most efficient but also the most economical type of service between the terminals.

Under this Act the land was granted to the railroad for the transportation of property and troops from Portland to points south; that is, from Portland to Black Butte and intermediate points, and beyond Black Butte to Roseville, California, and intermediate points. By what means they were transported was of no consequence. The only thing in which the United States was interested was in getting the goods from one place to the other, and, therefore, it can make no difference whether the Railroad Company chose to transport it to Roseville by the Natron cut-off, or entirely over the Siskiyou route.[4]

[4] It is, of course, true that the United States could not have required the petitioner to have transported goods from Portland to Klamath Falls or any other point on the Natron cut-off north of Black Butte without paying compensation therefor, but for transportation to points south of Black Butte it could make no difference to the United States by which route it was transported.

The 1928 Act, the caption of which states that it is for the relief of the Southern Pacific Railroad, provided, in effect, that the United States in the future would pay for transportation in an amount equal to fifty per cent of the amount charged private carriers. Accordingly, until November 11, 1931, the same charge was asserted against the United States by the petitioner for transportation of its goods whether they were transported over the Siskiyou route or over the Cascade route. This, of course, was proper because the thing for which the United States had contracted originally was the transportation of its goods from Portland to points south, and this irrespective of the route by which it was transported.

The United States hardly can be considered by the Act of 1928, not only to have agreed to pay the petitioner the same rate as that paid to other 50 per cent land-grant roads, but, in addition, to have waived its right to the economical use of the line which it had subsidized on the understanding that it would be recompensed by future benefits.

II

THE ADMINISTRATIVE CONSTRUCTION OF THE STATUTES

For something more than half a century, similar statutes have received a substantially consistent administrative construction which has long since become settled.

On April 17, 1888, the Comptroller of the Treasury ruled (3 Dig. Dec. 2d Comp. 299):

> If a railroad have a line between two points aided in whole or in part, and subsequently acquire a new line or lines, nonaided, between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line.

This rule has become settled in the settlement of accounts for transportation of Government property and troops. In one of the earliest rulings (5 Comp. Dec. 364 (1899)), it was applied with respect to the transportation of an employee of the respondent by the petitioner from Sacramento to San Francisco via Benitia, the shortest and cheapest route, rather than via Stockton and over aided road. In another instance, the Comptroller had to deal with a situation where, by reason of a change in the course of the river, the railroad used a different route, with an advantage of 18.013 per cent in its favor in the land-grant deduction (17 Comp. Dec. 633 (1911)). He held (p. 635):

> The principle underlying these decisions is that where a contract is fully executed by one party thereto the obligation incurred thereby is binding upon the other party.
>
> I do not understand that the railroad company has surrendered the grants and other

> benefits received from the Government; therefore the obligation to furnish transportation * * * should remain as originally fixed upon the acceptance of the grant. I see no reason for relieving the railroad company of its obligations voluntarily incurred by acceptance of the grant, the full benefit of which it still retains.

In 21 Comp. Dec. 238, 239 (1914), the Comptroller held that the Government was not to be deprived of the benefits of the original grant by the building of new lines which reduce the proportion of the original land-grant deduction. In 24 Comp. Dec. 193, 194 (1917), he held that the rule relates to the percentage of the deduction, and not to the rates charged at the time or prior to the shortening of the line. In 10 Comp. Gen. 552, 554 (1931), the Comptroller General held:

> * * * The principle is well established in a long line of decisions of this office, with which the courts have agreed, that when a land-grant road, for purposes of its own, builds cut-offs and uses substituted mileage for the land-grant mileage, the transportation over such substituted mileage is subject to the same conditions which would apply had there not been the substituted mileage. * * *

In 15 Comp. Gen. 614 (1936) the Comptroller General considered a shipment from Los Angeles, California, to Pasco, Washington. The line from Portland to Pasco, operated by the Northern

Pacific, is subject to deductions. The railroad claimed that the Portland to Pasco through rate was limited by its filed tariff to a non-aided line, and that the combined rates beyond another point should be applied. The Comptroller General held, in line with the established practice, that since the non-aided line was a lieu line of the Northern Pacific, the charges on it were subject to the original deduction, and that the fact that the tariff rate was restricted to a particular line could not operate to deprive the Government of the full deduction.[5]

The principle, conclusively established by these decisions, applied to and was acquiesced in by all land-grant railroads, and by the petitioner, after it joined, by statute, the class of roads receiving compensation. See *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, 660 (C. C. A. 8th). Petitioner insists there was no acquiescence on the part of the railroads. It finds this protest in the fact that many of the rulings of the Comptroller or Comptroller General were occasioned by the protest of the railroads. But, too plainly for dispute, the very absence of litigation such as that here insti-

[5] Compare *L. & N. R. R.* v. *United States*, 273 U. S. 321, in which this Court held that the administrative practice of the accounting officers of the respondent in making land-grant deductions from party rates, rather than from individual rates for passengers, was proper, even when tariffs restricted the party rates to cash purchases and provided that no land-grant deductions should be made.

tuted by petitioner demonstrates acquiescence in the rulings after they were made.*

The petitioner seeks to distinguish these rulings on the ground that they were applied to bond-aided railroads or involved the abandonment of the land-grant line for through traffic. The basic principle set forth in these decisions is, we submit, applicable to the case at bar. Petitioner does not explain why either distinction should produce a different result. (a) It is plainly a matter of indifference whether the consideration for the reduced or free rates is aid by the grant of land or by the donation of bonds. (b) If the original line is abandoned, rather than continued as an alternative route with higher tariffs, the Government obtains the deduction over a non-aided route because of a promise of a terminal-to-terminal benefit. The reasoning is equally applicable to the establishment of a cheaper alternative route. Petitioner's position, which is necessarily based upon the theory that the deduction applies only to particular trackage, can no more be squared with the administrative ruling upon abandoned lines than it can with the decision below.

It should be noted that, even if abandonment of the old route were necessary for application of this settled rule, the petitioner has, for practical purposes, abandoned the Siskiyou route so far as

* The litigation in the *Northern Pacific* case, *supra*, is an exception to this general record of acquiescence; perhaps one should also note the threat, never acted on, to contest the ruling in 15 Comp. Gen. 614, 615.

through traffic is concerned.[7] The increase of 100 per cent over the rates published for the Cascade route on through shipments of water-competitive traffic between Portland and San Francisco in every substantial sense closed that line to prospective users. And, as to traffic of all classes, the court below found that no through express freight service was maintained over the Siskiyou route, but that the service consisted of one local freight each way between Black Butte, California, and Springfield Junction, Oregon[7] (R. 16).

The petitioner contends that the terms of its contract with the respondent are so clear as to permit no change by administrative construction. Even if the contracts were as clear as petitioner implies (but see *supra*, pp. 14–18), no attempt is made to change the terms of the contract. What the Comptroller's settled practice serves to accomplish is to define the obligations of the contracts in terms so broad as to prevent an evasion of its spirit by the carriers. The obligation of the carrier, which is a continuing one, regardless of the necessary changes and developments in the course of years (3 Comp. Gen. 267, 268) has been defined and settled by administrative practice over a period of fifty years, unchanged by any expression on the part of Congress.

---

[7] The occasional use of the Siskiyou route by petitioner for reasons of economy, to relieve traffic on the Cascade route, was done at Cascade rates and on petitioner's own motion (see *supra*, p. 3).

It is, of course, settled that the long-continued uniform, practical application of a statute by the authorities administering it is entitled to great weight, and will not be disturbed by the courts except for cogent and persuasive reasons. *United States* v. *Shreveport Grain and El. Co.*, 287 U. S. 77, 84. See *Swendig* v. *Washington Co.*, 265 U. S. 322, 331; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413. Petitioner has advanced no reason why there should, after fifty years, be a judicial revision of the administrative practice.

In fact, this practice was specifically approved by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, rehearing denied, 32 F. (2d) 698. In that case a cut-off line from the original aided line was constructed, materially shortening the distance between two terminals there involved. "Since the construction of this short line between Little Falls and Staples, the route via Brainerd has been used for local traffic exclusively; the through traffic from St. Paul to the Pacific Coast being routed via the shorter line between Little Falls and Staples" (p. 657). The Government contended, there as here, that the railroad had, in effect, established a lieu line, and had as effectually closed the longer route to through Government traffic as if the rails had been removed. The court, in reversing a judgment for the railroad, referred with approval to the consistent practice of the government accounting officers in computing payments to aided

railroads, and held that an aided railroad could not, by subsequent construction of cut-offs and withdrawal of through service, deprive the United States of its right to deductions from the through rate on the basis of the land-grant ratio established when the railroad was first constructed.[8]

The petitioner urges that the new line did not constitute a cut-off, but a new route (Br. 32). We cannot see that the controversy is in any manner affected by the characterization of the new trackage as a "cut-off" or as a "lieu route." In either case, the basic issue remains whether the land-grant deduction applies to terminal-to-terminal carriage or to transportation over particular trackage. If a deviation from an original land grant, whether brought about by lieu routes or by cut-offs, be accepted as an absolution of the railroad from land-grant deductions, then, as the court stated in the *Nothern Pacific* case, *supra,* p. 659, "it would be easy, under the rule thus laid down, by degrees to whittle away the reserved rights of the government."

Petitioner urges that the administrative practice is not uniform, and relies on 7 Comp. Dec. 224

[8] The court stated (p. 659) that by its conduct the road deprived the United States "of one of the most important considerations for its grant, to wit, speedy, through transportation to the coast, unless it accepts fare reductions not in harmony with the legislation as construed by the parties to the contract over a long period." Compare Section 2 of the Act of July 25, 1866, *infra.*

(1900) and 8 Comp. Dec. 474 (1902). But the ruling in these cases was, whether accurately or not, restricted in the latter decision to cases where the government officer fails to specify the route over lines constructed by independent railroads from a common terminal to different points, which lines are subsequently projected to a second common point, and the roads subsequently come under common control.

It is submitted, therefore, that the recognized and established administrative practice consisting of the application of the original land-grant deduction proportion to any cut-off or lieu line constructed by a railroad, defines and determines the scope of the obligations of the statutory contract and should not after half a century be disturbed by the courts.

III

THE PRACTICAL CONSTRUCTION OF THE PARTIES

It is settled law that the practical interpretation of a contract by the parties thereto for any considerable period of time before it becomes the subject of controversy is of great, if not controlling, weight and creates in effect an estoppel. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118. As this Court said in *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what

> parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. * * *

It is respectfully submitted that in the instant case the conduct of all the parties leads to the inevitable conclusion that there was general agreement concerning the correct interpretation of petitioner's obligations.

The respondent has described in the preceding point the practice of its accounting officers. There can be no doubt that almost without exception the railroads subjected to the administrative practice have acquiesced in it, as shown by the fact that there apparently has been no litigation, with the exception of the *Northern Pacific* case and the instant case.

Even in the case of the petitioner, there has been a long period in which it has accepted this administrative construction of the statutes and the contract. The record reveals that in the period during which the petitioner was entitled to compensation, from September 1, 1926, the date of the completion of the Cascade route, to November 11, 1931, the date when the new rates were to become effective, the petitioner assessed charges against the respondent upon the basis of the full land-grant deduction proportion over the original

route (R. 20). The record does not explicitly show what route was used to transport government shipments made during that period; but the petitioner had issued instructions to route through traffic between San Francisco and Portland over the Cascade route, principally for the reason of economy (R. 16). It reasonably follows from this that unrouted traffic of the United States, both prior and subsequent to 1931, was transported over the Cascade route. Even at the present time the 75 per cent of the through traffic for which the tariff rates are the same over both routes undoubtedly moves over the Cascade route. Yet where the petitioner has in fact transported property of the United States over the Cascade route, it has not, prior to November 11, 1931, undertaken to charge on the percentage of land-grant mileage actually used on that route, but has applied the percentage of the Siskiyou route.[9] This, we submit, constitutes the practical interpretation of the contract which the parties themselves have placed upon it.

There should also be noted a statement made by the spokesman for the petitioner at the hearing[10]

---

[9] If the petitioner's own argument be adopted in respect of the percentage of land-grant deduction of mileage actually used in the instant case, the respondent was entitled to a deduction of at least 24.182 percent, since the freight was actually transported over a combination of lines comprising that proportion of land-grant deduction lines, instead of the 17.802 percent claimed by petitioner (R. 10).

[10] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 70th Cong., 1st Session, on H. R. 10162, Mar. 31, 1928.

on H. R. 10162, the companion bill of the Act of May 23, 1928, *infra*, p. 40. Mr. Ben C. Dey, appearing for the Southern Pacific Company, after stating the inequalities arising from the "free haul" provisions of the land-grant statute (Act of July 25, 1866, *infra*, p. 39), said (p. 19):

> * * * We have just completed between Black Butte, Calif., and Eugene, Oreg., a new line commonly called the Natron Cut-Off, at a cost of $40,000,000. It is an alternate route to the land-grant route, and yet we take all the Government business that is routed that way absolutely free, the same as we do on the green line [apparently the Siskiyou route], and when the green line is made a 50 per cent line, of course the Government will have the choice of either of those routes at 50 per cent.

That statement made on behalf of the petitioner[11] concedes that after the completion of the Cascade route, and before the enactment of the Act of May 23, 1928, the petitioner considered it an obligation under its contract with the respondent to apply the free-haul provision of the contract to the new route.

It is further supported by the Senate and House Committee reports on S. 3699, the Act of May 23, 1928, and H. R. 10162, the companion bill. The Senate report (Sen. Rep. No. 698, 70th Cong., 1st Sess.) states, in part, that the proposed relief is

---

[11] See also statement of Representative W. C. Hawley, author of the bill, at page 33 of the Hearing.

"designed only to permit this railroad to charge for future Government transportation 50 per cent of the published tariff rates which is the same basis now applicable to practically all other land-grant railroads of substantial mileage." No distinction is drawn in the report between the two routes. The House report (House Rep. No. 1538, 70th Cong., 1st Sess.) states that the acceptance of the land-grant obligated the railroad to the free transportation privilege of the Government forever, but that the inequality should be removed and that the "Government can not reasonably require a rate more favorable than 50 per cent of the ordinary tariff." The report of the Interstate Commerce Commission, annexed to the House report, specifically states that the purpose of the bill is to secure to the *lines* of the Southern Pacific between East Portland, Oregon, and Roseville, California, compensation at the rate awarded to other aided railroads.

The testimony of the petitioner's representative before the House Subcommittee is not offered here to interpret an Act of Congress; it is offered to show the practical construction placed on the contract by the parties. Cf. *Securities & Exchange Com'n* v. *Robert Collier & Co.*, 76 F. (2d) 939, 941 (C. C. A. 2d).

Indeed, it may well be argued that the statement of the petitioner's representative assuring the committee that the Government would not be further

harmed by the gratuitous release of its contractual rights, estops the petitioner from attempting to deprive the respondent of the full measure of benefit which Congress intended it to retain, and had every reason to believe from the petitioner's representations, that it would retain, should the petitioner be granted relief from the free-haul obligation of the original contract.

IV

THE RATE ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Petitioner urges throughout its brief that it had attempted to lower rates over the Siskiyou route, that the Interstate Commerce Commission had refused permission, and infers that it was authorized to lower its rates only over the Cascade route and compelled to raise its rates over the Siskiyou route. From this it draws the conclusion that, since the Commission compelled it to charge higher rates over the land-grant route, the respondent hardly can complain that it has not the land-grant benefits over the low-rate route (Br. 17, 18–19, 25, 44–49).

Even if the premises were true, the conclusion would not follow. If we assume a refusal of the Commission to allow lowered rates, this does not work a compensatory release of petitioner's obligations to the United States. Such a primitive theory of retaliation would equally release petitioner's obligations if, for example, the Commis-

sioner of Internal Revenue were to assess and collect taxes which were too high. The land grants placed petitioner under one obligation to the United States; the Interstate Commerce Act and its regulations create a wholly independent congeries of relationships and duties. Compare *United States* v. *U. P. R. R.*, 28 I. C. C. 518, 524.

But, in point of fact, petitioner mistakes the orders of the Interstate Commerce Commission upon which its argument is based.

The rate on shipments between Portland, Oregon, and San Francisco, California, over the petitioner's lines have always been influenced by the fact or threat of water competition. In order to meet such competition the petitioner after the completion of the Siskiyou route in 1887 maintained a low rate between those terminals so as to compete with the coastwise shipping tariffs. From time to time, as amendments were made to the Interstate Commerce Act relating to the so-called "Fourth Section Orders," hearings were had to determine the rate which might be charged. In 1912 and in 1922 hearings were had at which certain through rates were authorized. (22 I. C. C. 366; 24 I. C. C. 34.) In 1927 the Interstate Commerce Commission granted to the petitioner authority to maintain certain rates between the ports lower than the rates to intermediate points (129 I. C. C. 3). These rates, based on the distance and operating costs of the Siskiyou route, the petitioner did not accept, on the ground

that the minimum rates authorized by the order of 1927 were too high to enable it to compete with water traffic. The Cascade route was completed in 1926, and upon the basis of its lower operating costs, the petitioner obtained a reopening of the decision of the Interstate Commerce Commission (R. 16–18).

After hearing upon the reopened applications, the Interstate Commerce Commission ruled that the transportation between the ports of Portland, Oregon, and San Francisco, California, must be reasonably compensatory, and that such compensation must be reflected by a rate which would yield a minimum carload revenue of six mills a ton-mile, where the carload minimum weight is 40,000 pounds or over, and 12¢ a car-mile where the minimum weight is under 40,000 pounds. 165 I. C. C. 373, 410–413. In computing the earnings, the distance over the operating route over which the rates should be applied should govern. With reference to class rates, the Commission ruled that a certain minimum differential over the lowest water rates should be maintained. The only other limitation placed upon the authority of the petitioner was that the rates to intermediate points should not exceed by more than 100 per cent the through rates between the ports.

The petitioner contends that the decision of the Commission compelled it to increase the port-to-port rates over the Siskiyou route to 100 per cent over those charged for water-competitive traffic

over the Cascade route. But the order of the Commission had no such effect.

In the first place, so far as the Commission order was concerned it could be applied indifferently either to the Siskiyou or to the Cascade route. It is true that the carrier's evidence was presented on the basis of alternative routes, both of which were over the Natron cut-off and one of which apparently used the California cut-off of the Cascade route and the other the Siskiyou route (165 I. C. C. at 382). But this, of course, does not mean that the order was so restricted. In the opinion there is nothing to indicate that the Commission was limiting its Fourth Section relief to the Cascade route. There are many indications that it was terminal-to-terminal relief. (a) Throughout the opinion it speaks of rates between the ports, and not over designated routes. (b) In prescribing the minimum through rates, in terms of distance, the Commission said (p. 410) "the distance over the operating route over which the rates are to be applied shall govern." This plainly implies that the carrier could choose its own route. (c) It provided that intermediate rates should not exceed the through rates by more than 100 percent. Petitioner has viewed this as applicable to the intermediate rates on the Siskiyou route (R. 20). If this be the case, the through route which passes through the Siskiyou intermediate points must of necessity be included in the Commission order. (d) Petitioner urges that the previous Fourth Section relief granted over the

Siskiyou route in 1912 was vacated by this order of 1930 (Br. 47). But the order merely vacated previous Fourth Section orders "to the extent they are in conflict with the findings herein" (p. 413). If the 1930 order applied only to the Cascade route it contained nothing to conflict with the earlier Siskiyou through rates. (e) The 1930 order was subsequently modified in manners not here material in two further opinions. In each opinion it was described as an order which "affirmed," with modifications, the 1927 grant of Fourth Section relief (129 I. C. C. 3) which petitioner chose not to accept. 173 I. C. C. 577; 190 I. C. C. 273, 274. Since the 1927 order related to the Siskiyou route, it is difficult to see how its modification and affirmance in 1930 can be a denial of all relief to the Siskiyou route.

It seems, therefore, rather clear that the Fourth Section relief granted in 1930 was applicable to the Siskiyou as well as to the Cascade route.

Since the requirement as to minimum rates was placed on a mileage basis, the minimum Cascade rates between Portland and San Francisco would be 725.03/774.86 of the minimum rates allowed over the Siskiyou rate; this indicates a compulsory differential of about 6.5 per cent, instead of the 100 per cent instituted by the petitioner.[12]

[12] It may be noted that in 190 I. C. C. 273 the Commission granted the same authority to the Northern Pacific to meet water competition between San Francisco and Portland. It recognized (p. 290) that the somewhat longer distances would require somewhat higher minimum rates.

In the second place, even if the authority were restricted to the Cascade route, there was no compulsion upon the petitioner to raise the Siskiyou rates to 100 per cent over the Cascade rates. The Commission's order said that the intermediate rates could not be more than 100 per cent higher than the low through rates. This did not *require* the railroad to charge for its intermediate rates double the through rates. Even if the petitioner considered itself unable to apply the Fourth Section relief to the Siskiyou route, necessitating the through rate to be the sum of the intermediate rates, it cannot show any compulsion to make the intermediate rates double the throu h Cascade rate, with the result that the through Siskiyou rates were markedly increased with respect to water-competitive traffic. Petitioner had equal authority to reduce the intermediate rates to a point corresponding to the low through rates, as the Commission indicated in its opinion (165 I. C. C. at 396–397). Accordingly, there was no compulsory increase of the Siskiyou through rates and petitioner's argument based upon that theory necessarily fails.

The net result is that while the Siskiyou rates may be lower than maximum reasonable rates, they are excessive as applied to the only shipper compelled under the petitioner's theory of land-grant deductions to use that route. For it is obvious that a person desiring to send through freight between Portland and San Francisco would not designate the Siskiyou route. In fact, it is difficult to under-

stand why through rates are published over the Siskiyou route between Portland and San Francisco for any purpose other than to constitute a paper route for the purpose of increasing the charges on Government shipments. Therefore, the higher rates over the Siskiyou route are in fact and effect artificial rates constituting an indirect attempt to apply a special tariff to Government shipments. Cf. *Southern Pacific Co.* v. *United States,* 272 U. S. 445. Such artificial rates, it is respectfully submitted, should not affect the advantage over private shippers for which the respondent had paid consideration in grants of land. *Southern Pacific Co.* v. *United States,* 237 U. S. 202. If petitioner's theory were accepted, this contractual benefit might wholly be eliminated whenever the railroad should choose to establish an alternative route.

CONCLUSION

It is respectfully submitted that the decision of the court below is correct, and should be affirmed.

ROBERT H. JACKSON,
Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.
PAUL A. SWEENEY,
Special Assistant to the Attorney General.
WARNER W. GARDNER,
Special Attorney.
AARON B. HOLMAN,
Attorney.

MARCH 1939.

APPENDIX

Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241, provides in part as follows:

> *An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled;* That the "California and Oregon Railroad Company," * * *, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River val-

leys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company: * * *.

Sec. 2. *And be further enacted,* That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; * * *.

* * * * *

Sec. 5. *And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

The Act of May 23, 1928, c. 720, 45 Stat. 722–723, provides:

> Chap. 720.—An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided,* That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation.

The Act of March 3, 1863, c. 98, 12 Stat. 772, 773, provides, in part, as follows:

> *An Act for a Grant of Lands to the State of Kansas, in alternate Sections, to aid in the Construction of certain Railroads and Telegraphs in said State.*
>
> * * * * *
>
> SEC. 3. *And be it further enacted,* That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads and branches shall be and remain public highways, for the use of the Government of the United States,

free from all toll or other charge upon the transportation of any property or troops of the United States.

The Act of July 27, 1866, c. 278, 14 Stat. 292, 297, provides, in part, as follows:

An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.

* * * * *

SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service; and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Map op. p. 4 of dissent

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1938.

Southern Pacific Company, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[May 29, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the right of the Government to deduct from the public terminal-to-terminal tariffs of a railroad over a route, partly of land-grant aided mileage, identical with part of the mileage of another earlier constructed route of the same road between the same terminals, sums based upon the higher proportion of land-grant aided mileage in this latter route. On account of the importance of the question in administration, certiorari was granted.[1]

The carrier owns and operates two lines of railroad between Portland, Oregon, and Roseville, California, and Davis, California, both southern points being on the Central Pacific, now the Southern Pacific, Railroad in California. From the California junctions, there is direct connection over the same Southern Pacific rails into San Francisco. The older line is called the Siskiyou, the newer the Cascade Route. For a considerable portion of the distance between Portland and San Francisco, the two routes are identical. There are two differences; one is between Eugene, Oregon, and Black Butte, California. On the west the Siskiyou Route passes through Grant's Pass and Siskiyou, a distance of 300 miles, to connect Eugene and Black Butte. The eastern, or Cascade Route, joins the same two points by a shorter (275 miles) line through Natron and Klamath Falls. The second deviation is between Tehama, California, and

[1] Cf. Schedule of Land Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922. This shows the land-grant mileage in the United States at the date of issue. In order to obtain a share of government traffic, non-land-grant roads have entered widely into freight land-grant equalization agreements by which they agree to carry freight, routed over their lines at "the lowest net rates lawfully available, as derived through deductions account of land grant distance. . . ." Cf. Circular 3, Feb. 6, 1935, Office of Quartermaster General, War Department, Freight Land Grant Equalization Agreements.

Davis and Roseville respectively. Here the Siskiyou Route is to the east, 104 miles long, and the Cascade Route to the west, 110 miles.

Where the routes are identical, some of the mileage is land-grant aided. Some is not. The mileage of the Siskiyou which is different from the Cascade is largely land-grant aided. None of the Cascade Route, except where it uses the same rails as the Siskiyou, has land grants. Based on the proportion of aided mileage and the percentage of deduction allowed to the Government from the tariffs charged private shippers, the United States, between San Francisco and Portland, is entitled to a land-grant deduction via the Siskiyou Route of 42.792 per cent. Via the Cascade Route, the deduction is 17.801 per cent. There are slight variations for East Portland.

During December, 1931, and January, 1932, the carrier transported, in both directions, certain property of the United States on Government bills of lading from Portland or East Portland to San Francisco. No directions were given by the Government as to the routes over which the shipments were to move. While before November 11, 1931, the terminal-to-terminal rates over the two routes were the same, after that date authorized revisions resulted in a rate competitive with water borne commerce over the Cascade and a higher rate over the Siskiyou. These public tariffs were so much lower over the Cascade than they were over the Siskiyou Route, that the net cost to the Government, after the deductions deemed applicable by the railroad, was less over the Cascade than it was over the Siskiyou, despite the higher percentage of deduction allowed the latter route.

The Government was billed on the Cascade tariffs with deductions for land-grant mileage of about 17 per cent. It paid on the basis of the Cascade tariffs but deducted on the ratio of the land-grant to total miles between the terminals on the Siskiyou Route, or some 42 per cent. The Government claims that it is entitled to the lowest rate, between the terminals, less the percentage of deduction over the original land-grant aided route. The carrier protested and brought this action in the Court of Claims to recover the difference between the Cascade tariffs less the Cascade ratio of land-grant mileage and that paid by the Government, the Cascade tariffs less the Siskiyou ratio. The Court of Claims, after making special findings of fact, adjudged that the carrier was not entitled to recover and dismissed its petition.

The Government obtained concessions from the established tariffs by virtue of the acceptance by the carrier of grants of land, ten alternate sections per mile on each side of the line, to aid in the construction of a railroad as described in the statute authorizing the conveyance.[2] This statute was similar in form to the land grant construed in *Burke* v. *Southern Pacific Railroad Company*[3] and upon compliance with its requirements became a contract, "obligatory on both"[4] the carrier and Government. The carrier agreed it should "be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." The authorization was "to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California . . ." The road was located in accordance with these requirements.

In December, 1887, the Siskiyou Route was finished. The road running from its southern terminus at Roseville to San Francisco had been finished in 1870. This gave a through route from San Francisco to Portland, 774.16 miles long with 663.16 land-grant aided. The Cascade Route was built later in small sections primarily for local service or links in other projected distinct railroad undertakings. The California deviation from the Siskiyou between Tehama and Davis was finished in 1882. The Oregon section, forming with that portion of the Siskiyou an irregular ovoid figure, was put together between 1905 and 1926, being completed September first of the latter year. This route is 725.03 miles between Portland and San Francisco with 258.13 miles built with grants in aid. Each route is necessary for adequate transportation service to the areas traversed. At the time of the completion of the Cascade and until November 10, 1931, the tariffs over the two routes between the terminals were the same.

On May 23, 1928, there was enacted an act for the relief of the land-grant railroad operated between East Portland, Oregon, and

[2] Act of July 25, 1866, 14 Stat. 239.

[3] 234 U. S. 669.

[4] *Id.* 680; cf. United States v. Central Pacific R. R., 118 U. S. 235, 238.

Roseville, California.[5] As Roseville is the junction terminal of the Siskiyou and is not served by the Cascade, this description covers only the Siskiyou line built under the 1866 act. By its terms, the Government relinquished its privilege of free transportation and accepted in lieu thereof a right to the same rate as is paid to other land-grant roads. This is fifty per cent of the public tariff for land-grant aided mileage.[6]

The Act of 1866, granting the aid, specified, only generally, the route of the new road. It was to begin at some point on the Central Pacific Railroad in the Sacramento Valley and thence run northerly to Portland. By the grant of millions of acres of public lands, the Government prepaid for transportation[7] over the line, wherever it might be built. It was entitled to service for its property or troops without further cost from whomsoever owned or operated the aided facility between the Central Pacific and Portland.[8] By the 1928 act, the Government agreed, for the "relief of the land-grant" road, to put it upon the same basis as other land-grant roads. By this concession, no change was made in the extent of the obligation to give land-grant service.

The two acts are quite clear in their requirement that the company which constructed the road or its successors in ownership or operation should transport the property or troops of the United States over the railroad at the rate fixed by their provisions. The uncertainty as to the meaning arises in the application of the right of transportation to the mileage. On completion of the original project between Portland and the Central Pacific, there was a definite right of way, the present Siskiyou Route, with every mile

---

[5] The Act of May 23, 1928, c. 720, 45 Stat. 722-723, provides:

"Chap. 720.—An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided,* That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation."

[6] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 454, 455; L. & N. R. R. *v.* United States, 273 U. S. 321, 323. Act of June 7, 1924, c. 291, 43 Stat. 477, 486. This act determined the proportion of the regular tariff to be paid for the transportation.

[7] L. & N. R. R. *v.* United States, 267 U. S. 395, 402.

[8] Sec. 5, Act of July 25, 1866, 14 Stat. 240.

between East Portland and the Central Pacific aided by land grants. This same situation existed as to all or parts of other bond or land aided roads.[9] Soon there were changes and shortening of these lines. The Government was faced with the problem of the proper ratio of land-grant or bond-aided deductions or allocations to be applied where new non-aid mileage is used between terminals formerly served in a higher proportion by land-grant mileage. Cut-offs and the elimination of curves furnished occasion for these decisions. Thus in 1888 in a ruling as to transportation services rendered by the Central Pacific Railroad, where the Central had three lines from Sacramento to San Francisco, with

[9] The laws relating to land-grant and bond-aided railroads contain several types of conditions. The most prevalent condition was that "the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." This was construed to require the railroad to furnish only free use of the rails and permanent structures. Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442. It is to be found in the following acts: Act of Sept. 20, 1850, 9 Stat. 466 (Ill. Cent. R. R.; Mobile & O. R. R.); Act of June 10, 1852, 10 Stat. 8 (Chicago, B. & Q. R. R.; Missouri Pac. Ry; St. Louis & S. F. Ry.); Act of Feb. 9, 1853, 10 Stat. 155 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.); Act of May 15, 1856, 11 Stat. 9 (Chicago & N. W. Ry.; Chicago, B. & Q. R. R.; Chicago, M. & St. P. Ry.; Chicago, R. I. & Pac. Ry.); Act of May 17, 1856, 11 Stat. 15 (Louisville & N. R. R.; Seaboard Air Line Ry.); Act of June 3, 1856, 11 Stat. 17, 18, 20, 21 (Ala. Great So. R. R.; Central of Ga. Ry.; Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Duluth, So. Shore & At. Ry.; Grand Rapids & Ind. R. R.; Grand Trunk R. R.; N. Y. Cent. R. R.; Louisville & N. R. R.; Mich. Cent. R. R.; Missouri, Kan. & Texas Ry.; Nashville, C. & St. L. Ry.; Pere Marquette R. R.; Southern Ry. Co.; Vicksburg, S. & Pac. R. R.); Act of Aug. 11, 1856, 11 Stat. 30 (Ala. & Vicksburg Ry.; Gulf & Ship Id. R. R.); Act of March 3, 1857, 11 Stat. 195 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Great No. Ry.; Northern Pac. Ry.); Act of March 3, 1863, 12 Stat. 772 (Atchison, T. & S. F. Ry.; Missouri, Kan. & Texas Ry.); Act of May 5, 1864, 13 Stat. 64 (Northern Pac. Ry.); Act of May 5, 1864, 13 Stat. 66 (Minneapolis, St. P. & S. Ste. Marie Ry.); Act of May 12, 1864, 13 Stat. 72 (Chicago, M. and St. P. Ry.); Act of March 3, 1865, 13 Stat. 526 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Great No. Ry., Northern Pac. Ry.). Some of the grants went further and required the railroad to furnish free transportation. Act of July 1, 1864, 13 Stat. 339 (Missouri, Kan. & Texas Ry.); Act of July 3, 1866, 14 Stat. 78 (N. Y. Cent. R. R.; Mich. Cent. R. R.); Act of July 4, 1866, 14 Stat. 87 (Chicago, M. & St. P. Ry.); Act of July 25, 1866, 14 Stat. 239 (Southern Pac. Co.); Act of July 26, 1866, 14 Stat. 289 (Missouri, Kans. & Texas Ry.); Act of July 28, 1866, 14 Stat. 338 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.). Others authorized the railroad to charge for Government transportation, subject to regulations which Congress might impose restricting such charges. Act of July 2, 1864, 13 Stat. 365 (Northern Pac. Ry.); Act of July 27, 1866, 14 Stat. 292 (Atchison, T. & S. F. Coast Lines; St. Louis & S. F. Ry.; Southern Pac. Co.); Act of March 3, 1871, 16 Stat. 573 (Southern Pac. Co.). The Act of July 1, 1862, 12 Stat. 489 (Missouri Pac. Ry.), provided for fair and reasonable rates for Government transportation, not to exceed the amounts paid by private parties for the same kind of service. See Schedule of Land-Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922.

varying bond-aided mileages, the Comptroller of the Treasury ruled, when the road sought to render statements for the line actually used, that all United States accounts should be stated in terms of the bond-aided mileage of the original route. As the amounts due to the carrier were applied to retirement of the bonds in aid, this ruling preserved the charges for this purpose. This ruling has been followed in roads aided by land-grants.[10] The long continued administrative interpretation has decided weight in reaching a conclusion upon the construction of this contract,[11] particularly when the Congress after such interpretation gives up a right for free transportation between the terminals. Any doubt must be resolved in favor of the Government.[12]

The construction adopted in the Court of Claims was reached in *United States* v. *Northern Pac. Ry. Co.*[13] where there was a shortening of 94.24 miles in the through route between St. Paul and Seattle by means of a cut-off. In that case, too, the old route was maintained for local use.

It is urged, however, that in this instance we have a new line, an addition, rather than a cut-off in or a shortening or straightening of an original line.[14] So far as terminal-to-terminal transportation is concerned, the Cascade Route does not function as a new line or an addition. It is simply another way of carrying goods by the same railroad between San Francisco and Portland. By which route the shipment moves, is immaterial on the question of deduction for land grants. The conclusion that the lowest public tariffs are to have land-grant deductions based upon the proportion of the land-grant mileage in the original line, seems consonant with the purpose of the acts.

Affirmed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

---

[10] (1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; (1911) XVII Dec. of Comp of Treas. 633; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474.

[11] Cf. Fox v. Standard Oil Co., 294 U. S. 87, 96; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 329-30.

[12] Broad River Co. v. So. Carolina, 281 U. S. 537, 542

[13] 30 F. (2d) 655; rehearing denied, 32 F. (2d) 698.

[14] United States v. Kansas Pac. Ry. Co., 99 U. S. 455; United States v. Denver Pac. Ry. Co., 99 U. S. 460; United States v. Central Pacific R. R. Co., 118 U. S. 235.

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1938.

Southern Pacific Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[May 22, 1939.]

Mr. Justice Butler, dissenting.

The land-grant Act of July 25, 1866, and compliance with it constitute a contract.[1] This case calls for construction of a provision in § 5.[2] The court of claims sustained the government's deduction on account of land-grant mileage that is not included in or possibly attributable to the railroad over which the shipments moved. The inclusion, as a part of the aided railroad, of 275.6 miles of the Cascade Route between Springfield Junction, Oregon and Black Butte, California, is not permissible under the terms of the contract, nor is computation of the land-grant deduction from charges for transportation via Cascade on the percentage applicable to charges for transportation via Siskiyou warranted by constructions heretofore put upon like Acts. See (opposite p. 2) reproduction of map submitted as an exhibit at the argument in this Court.

I.

The grant was made to induce and aid construction of a railroad between Portland and some point to be selected by the grantees

[1] Lake Superior & Miss R. R. Co. *v.* United States, 93 U. S. 442. Union Pacific R. R. Co. *v.* United States, 104 U. S. 662, 664. United States *v.* Central Pacific R. R. Co., 118 U. S. 235, 238. Burke *v.* Southern Pacific R. R. Co., 234 U. S. 669, 680. United States *v.* Northern Pac. Ry. Co., 256 U. S. 51, 64. United States *v.* Galveston &c. Ry. Co., 279 U. S. 401.

[2] "And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad . . . in repair and use, and shall at all times transport the mails upon said railroad . . . for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad . . . therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." 14 Stat. 239, 240-241.

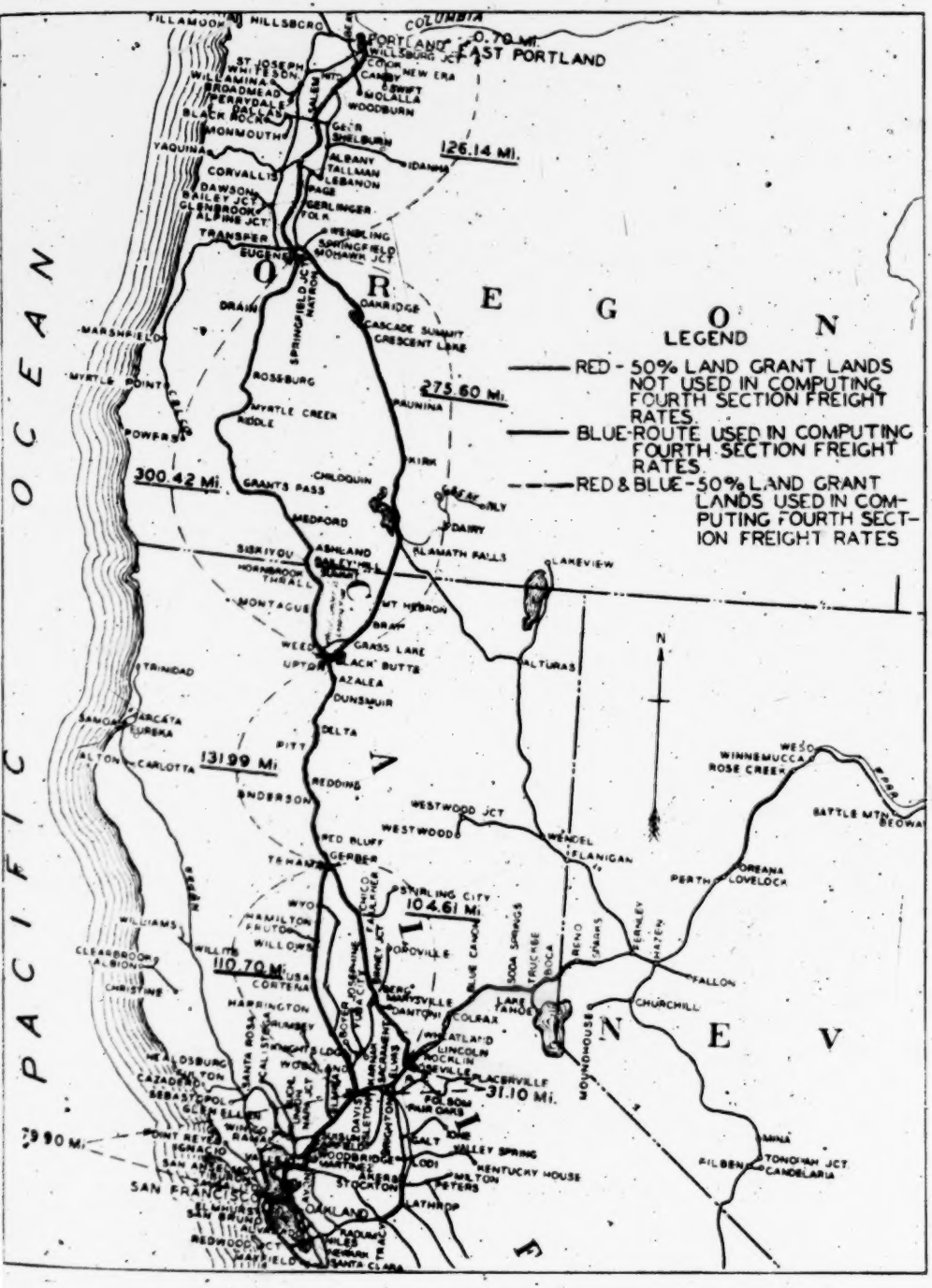
on the Central Pacific to serve the Willamette, Umqua, and Rogue River Valleys in Oregon, and the Sacramento and Shasta Valleys in California, and to be located as shown on maps made by the grantees and filed with the Secretary of the Interior. The railroad was located and constructed, and, since its completion in 1887, has been maintained and kept in use, in accordance with the contract. The aided portion is 663.13 miles long, extending between East Portland, Oregon and Roseville, California, a point on the Central Pacific east of Sacramento and about 111 miles from San Francisco. It is now called the Siskiyou Route.

Section 5 declares that the grantees shall keep "said railroad" in repair and use; that it shall be "a public highway" for the use of the United States; and that property and troops of the United States shall be transported over "said road" at the cost, charge, and expense of the corporations or companies owning or operating "the same", when so required by the government.

Plainly the contract applies only to the land-aided railroad between Portland and Roseville; not to the haul between Portland and San Francisco, nor to that between Roseville and San Francisco. The contract neither expresses nor implies any special undertaking by the carrier as to charges for government transportation between the port or terminal of Portland and that of San Francisco.

The Act of May 23, 1928[3] merely substitutes 50 per cent of the commercial charges for free transportation under § 5. Thus, as modified, the Act of 1866 requires plaintiff to furnish government transportation between points on and wholly via the land-grant railroad for one-half the charges applicable to like service for private parties. And for government transportation between a point on the aided railroad and one on another line there is deducted from charges generally made one-half the percentage that aided mileage attributable to that service is of the total miles hauled.

[3] "An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California. Be it enacted . . . That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278) [pursuant to which such railroads transport government property at a charge of 50 per cent of the regular tariffs]: Provided, that the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such government transportation."

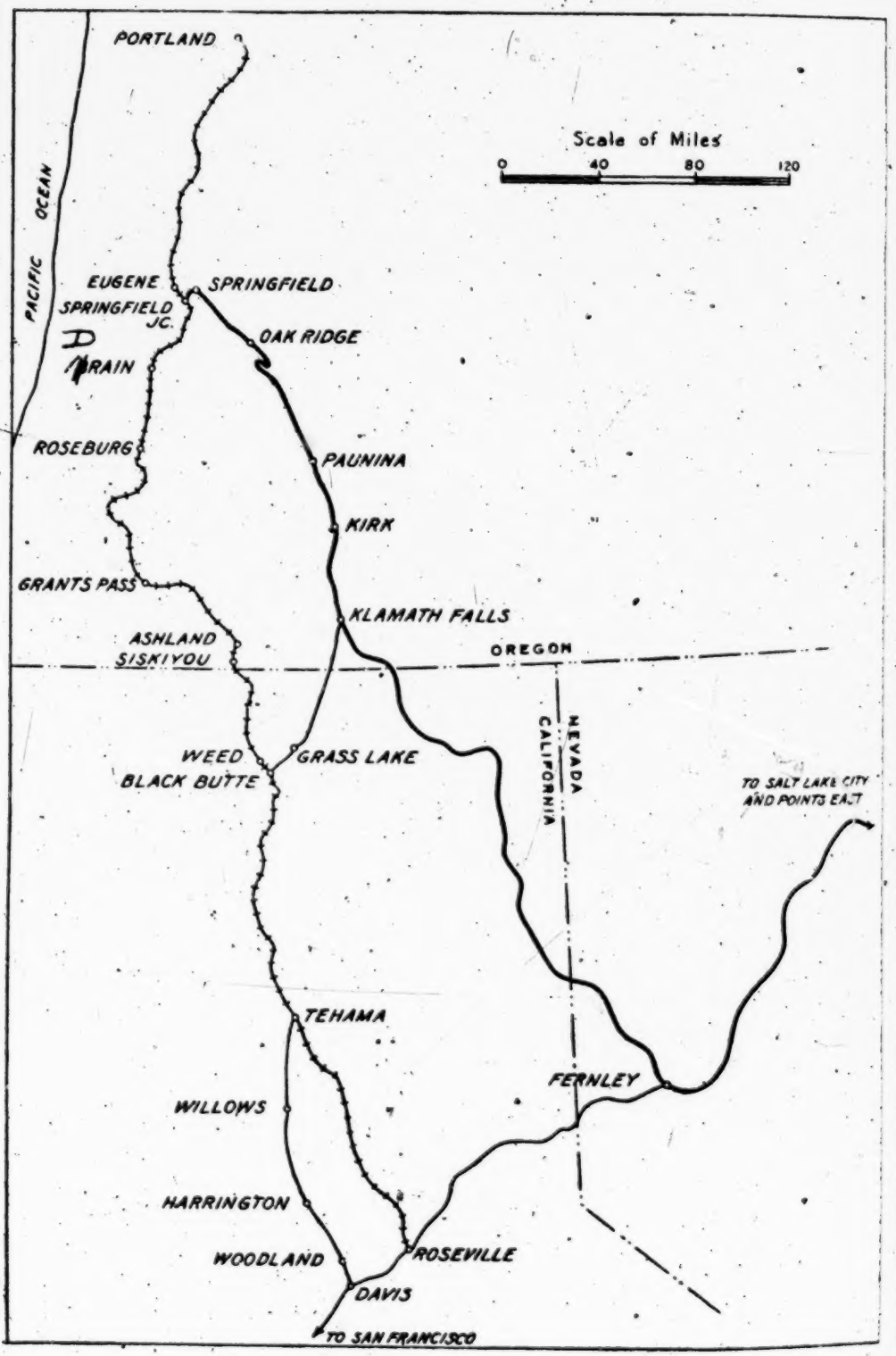

PACIFIC OCEAN
OREGON
NEVADA
LEGEND
RED - 50% LAND GRANT LANDS NOT USED IN COMPUTING FOURTH SECTION FREIGHT RATES.
BLUE-ROUTE USED IN COMPUTING FOURTH SECTION FREIGHT RATES.
RED & BLUE - 50% LAND GRANT LANDS USED IN COMPUTING FOURTH SECTION FREIGHT RATES
126.14 Mi.
275.60 Mi.
300.42 Mi.
131.99 Mi.
104.61 Mi.
110.70 Mi.
31.10 Mi.
79.90 Mi.
0.70 Mi.
EAST PORTLAND
PORTLAND
COLUMBIA
SAN FRANCISCO
OAKLAND
STOCKTON
SACRAMENTO
RENO
TRUCKEE
SODA SPRINGS
LAKE TAHOE
FERNLEY
HAZEN
FALLON
CHURCHILL
WINNEMUCCA
ROSE CREEK
BATTLE MTN.
WENDEL
LANIGAN
ALTURAS
LAKEVIEW
KLAMATH FALLS
MEDFORD
GRANTS PASS
ROSEBURG
EUGENE
SALEM
ALBANY
CORVALLIS
TILLAMOOK
HILLSBORO
MARSHFIELD
COOS BAY
REDDING
RED BLUFF
WESTWOOD
WESTWOOD JCT
QUINCY
DAIRY
MONTAGUE
WEED
GRASS LAKE
BLACK BUTTE
TRINIDAD
ARCATA
EUREKA
CARLOTTA
DUNSMUIR
DELTA
ANDERSON
WILLOWS
WILLIAMS
CLEARBROOK
CHRISTINE
HARRINGTON
WOODLAND
DAVISVILLE
DAVIS
WINTERS
ROCKLIN
LINCOLN
PLACERVILLE
COLFAX
DANVILLE
SUISUN
VALLEJO
BENICIA
MARTINEZ
ANTIOCH
TRACY
LATHROP
MANTECA
LODI
GALT
IONE
VALLEY SPRING
KENTUCKY HOUSE
MILTON
PETERS
SANTA CLARA
SAN JOSE
REDWOOD JCT
NILES
HAYWARD
SAN LEANDRO
ALAMEDA
SAN MATEO
SAN RAFAEL
POINT REYES
PETALUMA
SANTA ROSA
HEALDSBURG
CLOVERDALE
WILLITS
UKIAH
CALPELLA
HOPLAND
CLEAR LAKE
LAKEPORT
CALISTOGA
NAPA
VALLEJO
CROCKETT
PITTSBURG
ANTIOCH
MOUNDHOUSE
PERTH
LOVELOCK
OREANA
WELLS
TONOPAH JCT
CANDELARIA
GERLACH
SPRINGFIELD
WENDLING
ALBANY
LEBANON
SWEET HOME
MOLALLA
NEW ERA
CANBY
OREGON CITY
GLADSTONE
MILWAUKIE
ST JOSEPH
WHITESON
WILLAMINA
BROADMEAD
PERRYDALE
DALLAS
BLACK ROCK
MONMOUTH
YAQUINA
DAWSON
BAILEY JCT
GLENBROOK
ALPINE JCT
TRANSPER
DRAIN
MYRTLE POINT
POWERS
RIDDLE
MYRTLE CREEK
CANYONVILLE
GLIDE
DANEBRIDGE
CASCADE SUMMIT
CRESCENT LAKE
CHILOQUIN
KIRK
DORRIS
HORNBROOK
THRALL
SISKIYOU
ASHLAND
MT HEBRON
BRAN
UPTON
AZALEA
SANGER
ALTON
PITT
ORLAND
WILLOWS
HAMILTON
BRUTON
CORTENA
GERBER
STERLING CITY
BOROVILLE
BLUE CANYON
NORDEN
TRUCKEE
CLIO
FRANKTOWN
VERDI
SPARKS
WADSWORTH
FERNLEY
HAZEN
FALLON
CHURCHILL
MINA
FILBEN
TONOPAH JCT
CANDELARIA
N

The Cascade stretch was not completed until 1926 and, as shown by the findings, it is made up of branches extended during a number of years prior to 1912 little by little from Black Butte to Kirk to reach productive forest and agricultural areas. See Diagram 1, following page. At its northerly end a short piece from Springfield Junction to Natron was completed in 1891; in 1912 that branch was built to Oakridge to serve timber areas on both sides of the Cascades and ultimately to be a part of a line connecting with the Central Pacific in Nevada or with the Union Pacific in eastern Oregon. These systems were then under one control. About the same time—1911-1914—plaintiff built from Fernley, Nevada, a point on the Central Pacific, northwesterly to Westwood, California to serve industries there. Consummation of the project to complete the line between Fernley and Springfield Junction via Natron, Oakridge, Kirk, and Klamath Falls was delayed because of the suit brought in 1908 under the Sherman Anti-Trust Act by the United States in the circuit court for the district of Utah (see 188 F. 102), which resulted in decree dissolving control by the Union Pacific of the Southern Pacific. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61. In 1929, with the approval of the Interstate Commerce Commission, plaintiff completed the connection between Springfield Junction and Fernley to form a part of the through route between Portland, Salt Lake City, and points east.

The court of claims found that since the completion of the Cascade stretch "plaintiff has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou route . . . . serving the valleys and areas described . . . producing much tonnage of timber, agricultural products, livestock, etc., and the other the Cascade route . . . also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. Plaintiff has maintained the Siskiyou route, transporting a substantial and varied traffic and serving a large and important area. The Siskiyou route and the Cascade route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines."

The stretch of railroad between Springfield Junction and Black Butte via Siskiyou, all land-aided, is 300.42 miles long; it is used for through transportation and also serves locally in the Willamette,

DIAGRAM 1.
Hatched Lines Show Land-aided Mileage.



Umqua, and Rogue River Valleys. All land-aided mileage in that route continuously has been operated and maintained for the service of the public, including transportation of property and troops of the United States. The stretch between the same points via Cascade, none of it land-aided, is 275.6 miles long, most of which is east of the Cascade Mountains. It also carries through and local traffic. To illustrate how unreasonable and arbitrary it is to attribute that mileage to the aided railroad built, as required by the Act of 1866, to open and develop the great valleys west of the mountains, let it be noted that except at and near the connecting points, Springfield Junction and Black Butte, these stretches serve widely separated territories of vast extent; the area between them is greater than that of the State of Massachusetts. The mileage of the Cascade stretch is greater than the distance between Washington and West Point via New York City. The mileage of the Siskiyou stretch is substantially the same as the distance between Washington and Pittsburg.

Upon completion of the Siskiyou Route, plaintiff established through rates between Oregon and California points; in order to meet competition of water carriers, it was compelled to make rates between Portland and San Francisco lower than rates between intermediate points. In 1912, after enactment of the long and short haul clause of § 4, Interstate Commerce Act, the Commission permitted the maintenance of lower through rates; it found they were forced by water competition and were lower than normal, fair and reasonable rates. In 1920, § 4 was again amended to require the Commission to find that the lower through rates permitted by it were reasonably compensatory. In 1927, the Commission, upon plaintiff's showing of operating costs on the Siskiyou Route, found that the through rates were less than reasonable and granted authority to establish rates between the terminals lower than intermediate rates but so much higher than the competing water rates that plaintiff could not share in the business. The Commission thereafter reopened the case. In order to show the reasonably compensatory nature of the lower through rates, plaintiff based its showing on the more favorable transportation conditions and substantially lower operating costs on the Cascade Route. Pursuant to the Commission's report and order of July, 1930, the plaintiff revised its tariffs effective November 11, 1931. The low through rates on the Siskiyou Route were discontinued and higher rates in accord with § 4 were substituted. Much lower rates, to meet water competition, were established via the Cascade Route as to transportation

of about 25 per cent of all articles that move between the cities of Portland and San Francisco. During the period between completion of the Cascade Route and the effective date of the new rates, the through rates were the same via both routes.

The aided mileage in the Siskiyou Route, 663.16 miles, between Portland and San Francisco, is 85.584 per cent of the total. The aided mileage in the Cascade Route is 258.13 miles, or 35.602 per cent of the total. Charges for the shipments in question applicable via the Cascade Route, less 17.801 per cent (one-half of the per cent of land-grant mileage to total) are substantially less than those via Siskiyou, less 42.792 per cent. The government did not expressly direct the shipments in question to be hauled over the Cascade Route but it did in fact choose to have them go that way. It was plaintiff's duty to send them over the route on which the charges would be lower. The government refused to pay more than the lower rates applicable via Cascade minus the land-grant deduction of 42.792 per cent applicable to the higher charges over the Siskiyou Route.

The findings compel the conclusions that the Cascade stretch between Springfield Junction and Black Butte was not built to better alignment or lessen grades of, add trackage to or otherwise improve, the land-aided stretch via Siskiyou between the same points; that it was made up of branches and extensions constructed from time to time to develop productive areas, to serve local needs and, upon completion, to be a separate and distinct railroad between Springfield Junction and Black Butte, a part of which was also to serve as a section of the transcontinental route above referred to. Clearly it is not a part of the railroad aided by the grant of 1866. It was not constructed to aid transportation on, or as a substitute for, any part of the aided railroad. The fact that it is used to haul government shipments like those in question does not suggest any failure of plaintiff fully to perform the land-grant contract to maintain and keep in use the aided railroad between Portland and Roseville. There is nothing in the grant, or in the circumstances under which it was made and complied with, that gives any support to the government's claim that, from the lower charges applicable to shipments by private parties via Cascade, it is entitled to deduct the higher land-grant percentage applicable to transportation via Siskiyou.

II.

The opinion of the court of claims shows its judgment to have been reached on an assumption of fact that is not sustained by the findings or otherwise supported. It says: "'The method of settlement with plaintiff used by the General Accounting Office in this case has been consistently and uniformly followed by the defendant's accounting officers for more than fifty years in cases involving the same or similar questions."

There is no finding to that effect, but to support the statement the opinion continues: "The principle was stated by the Second Comptroller of the Treasury in a decision April 17, 1888, as follows: 'If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line.'"

The decision referred to has not been reported or anywhere published. It may be found on file in the General Accounting Office, Miscellaneous Claims Division, Vol. 55, p. 422. The passage above-quoted is one of two sentences excerpted from different parts of the document and together published, without more, as paragraph 1160, Vol. 3, p. 299 of Kern's 1893 Digest of Decisions of the Second Comptroller of the Treasury.[4] As counsel failed to make available to us the unreported text of the decision, it is assumed that nothing more than the statement in the Digest was brought to the attention of the lower court.

To give weight to the Second Comptroller's dictum and justify its application to this case, the lower court adds: "'This rule as stated has been uniformly observed in the settlement of accounts for government transportation of property and troops of the United States, and has been applied in settlement of accounts for transportation rendered by a shorter line substituted in whole or in part for the longer aided and original line. (See stipulations of the parties in *United States* v. *Northern Pacific Ry. Co.*, 30 F. 2d 655.) This long established rule has been acquiesced in by land-

[4] The first sentence reads: "The Central Pacific Railroad Company should recognize the Government's demand that its security for repayment of money advanced in aid of the construction of the original line be not impaired or whittled away by a duplicating of the line."

grant railroads generally and was acquieseed in by this plaintiff during the period between the completion of its Cascade line in 1926 to 1931 when its accounts against the Government for the transportation of Government property were settled in this manner. It was not until the shipments involved in this suit were moved that plaintiff made protest against the position of the Government. We do not regard the fact the rates between San Francisco and Portland were the same over both routes between 1926 and 1931 as material or altering in any way the principle involved."

As to that passage, it is to be observed:

The opinion states that the rule, said to have been established by administrative practice, has been applied to transportation rendered by a "shorter line substituted in whole or in part for the longer aided and original line." The court definitely found that the Cascade stretch is a line separate and distinct from the aided railroad. It was not substituted for or used in lieu of the Siskiyou Route. It was chosen by or for the government because applicable charges, whatever the basis of calculation of land grant deductions, were less than those for like transportation via the other stretch.

The cited stipulation between the Northern Pacific Railway and the United States cannot here be made to serve in lieu of special findings of fact.[5] Moreover, as will be shown, the circuit court of appeals in that case held against the carrier on the ground that new unaided mileage had been substituted for aided mileage in the original route. That case makes strongly in favor of plaintiff here, for the findings of the court of claims show that no part of the original aided railroad had been abandoned as to the traffic in question or otherwise.

The lower court's statement that, from the completion of the Cascade stretch in 1926, until the shipments here involved, plaintiff acquiesced in the rule adopted by the court is not supported by the findings. But, even if warranted, it is without significance for the question presented in this case did not and could not arise while the rates applicable between Portland and San Francisco were the same.

---

[5] See M. E. Blatt Co. *v.* United States, 305 U. S. 267, 277. Stone *v.* United States, 164 U. S. 380, 383. Crocker *v.* United States, 240 U. S. 74, 78. Brothers *v.* United States, 250 U. S. 88, 93. United States *v.* Wells, 283 U. S. 102, 120. United States *v.* Esnault-Pelterie, 299 U. S. 201, 206. And see American Propeller Co. *v.* United States, 300 U. S. 475, 479-480.

III.

The court of claims failed to find as fact that the government followed, or the carriers accepted as sound, the dictum excerpted by Kern from the decision of the Second Comptroller of April 17, 1888. To supply the omission, the government cites in its brief, without adequate statement of the facts or explanation, all administrative rulings and judicial decisions it deems to have any bearing on the question now before us. The former are referred to in footnote 10 of this Court's opinion.[6] Here the material substance of each will be indicated.

1. Ruling of April 17, 1888, by Second Comptroller of the Treasury, Butler. At that time, the Central Pacific had three lines between Sacramento and San Francisco. They are indicated on Diagram 2, following page. Route 1, via Brighton, Tracy and Niles was the original railroad, 140 miles, of which 103 were bond-aided. Route 2 via Davis and Port Costa, 90 miles, had no aided mileage. Route 3 via Brighton, Tracy, and Port Costa was 151 miles, of which 63 belonged to the bond-aided stretch in Route 1. The bonds in aid were given under the Act of July 1, 1862, 12 Stat. 489, 494. See also amendatory Acts of July 2, 1864, 13 Stat. 356, and May 7, 1878, 20 Stat. 56. Section 6 declares that the aid grants are made on condition that the company shall keep the railroad in repair and use, transport troops and property of the government "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," and that all compensation for that transportation shall be applied to the payment of the bonds. For a time immediately preceding the Second Comptroller's decision, the government stated the accounts of the company as though all shipments had been hauled over Route 1. The railroad maintained that payment should be made in accordance with the bond-aided mileage in the route used. Thus arose the issue decided.

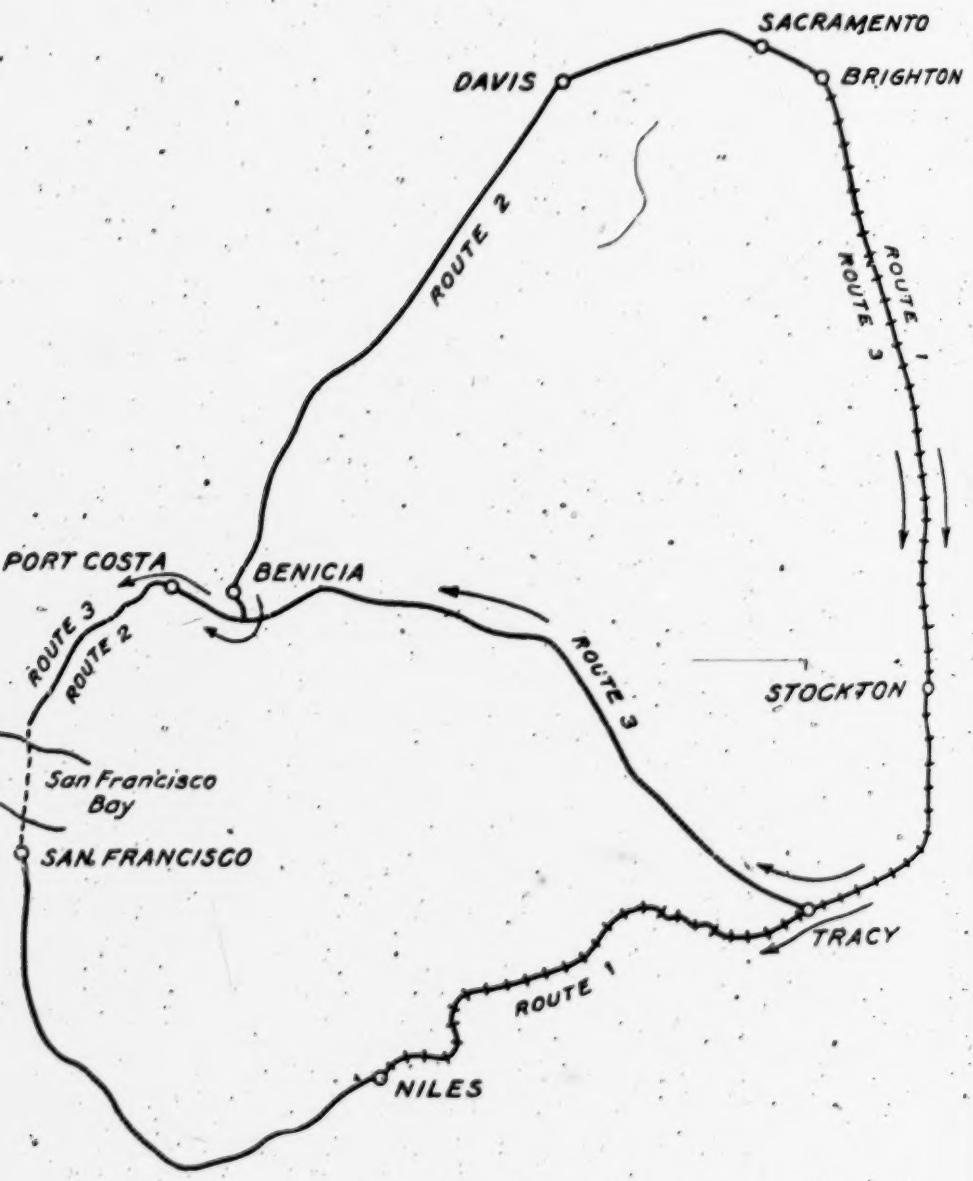
The bond-aid contract had been construed to require the Treasury to retain the compensation for government transportation over

[6] The footnote reads: "(1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; followed, (1911) XVII Dec. of Comp. of Treas. 632; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474."

DIAGRAM 2.

Scale: Appx. 1 inch = 12 miles.

Hatched Lines Show Bond-aided Mileage.



bond-aided mileage and to apply it in payment of the bonds. *United States* v. *Kansas Pac. Railway Co.*, 99 U. S. 455. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235. These cases definitely established that compensation for government transportation over nonaided extensions of the aided railroads should not be withheld or applied to pay the bond debt. But the Second Comptroller held that rule not applicable. He found that accounting officers were required by the Act to determine whether the rates are "fair and reasonable", and stated the problem thus: "Given a certain state of facts, what is the service rendered by the railroad, and what is a fair and reasonable compensation therefor?"

More specifically to disclose the point, the Second Comptroller referred to the contractual relations between the government and the carriers, and asked himself: "Are those relations impaired by the railroad, if it pursues the course which in the present case it contends to be right?" He answered affirmatively and to sustain that view reasoned as follows: To reimburse itself the government may withhold compensation for "carriage over an aided line." The security is impaired if the railroad "parallels or duplicates an aided line between two points and diverts the government business to that line without in some way recognizing its indebtedness to the government."[7]

Then, granting that on strictest legal construction of the statutes and of the decisions of this Court there was nothing to preclude such a course by the railroad, the Second Comptroller went on to say: "But the principles of equity and ethics forbid the application of such a construction." Invoking the maxim "He that seeks equity must do equity" as being "most forcibly pertinent," he declared that so long as the railroad is indebted to the government on account of the bond-aided line, it must not imperil the government's opportunity to recoup, and concluded that all accounts, without regard to the route used, should be stated upon the basis of bond-aided mileage.

The company claimed that acquisition of Route 2 was necessary because it threatened the existence of the Central Pacific and that Route 3 was acquired for convenience because it had better grades

[7] And then, the decision quotes a passage from a message of President Cleveland, then very recently sent to Congress with the report of three commissioners appointed to investigate the affairs of railroad companies that had received government aid, declaring that the acts were passed upon the theory that the roads should be constructed "according to the common rules of business, fairness, and duty, and that their ability to pay their debts should not be impaired by unfair manipulations."

than the original line. It argued that the Government had an interest in the new lines and should be willing to pay entire compensation for carriage over them. Against that contention the Second Comptroller said: "But the acquiring or building by a railroad of new lines connecting two points already connected by the road of the company is one of the ordinary elements of modern railroading, intended to enhance the usefulness of the original line, in the same way as does the *replacing of iron by steel rails,* or *wooden by stone buildings,* of *hand-brakes by automatic appliances.*[8] Is the Government to lose its right of withholding compensation for *carriage over a trestle,* the construction of which *in wood* it aided, simply because the railroad has seen fit *to replace the wooden structure by one of iron?*"

He denounced as untenable both the position of the government and that of the company, and declared "that a medium course is not only practicable and equitable, but is justified under the Acts . . . by the changed and apparently unanticipated condition of affairs since the construction of the railroad was contemplated." He suggested that the company should recognize that the government's security should not be impaired by a duplicating line, and that the government should recognize such an improvement of route as materially lessens distance or difficulties of transportation between two points. Then reasoning in more definite terms, he said:

"If the original line . . . , 140 miles in length, were entirely aided, and the Government's supplies were taken over the new and unaided line, 90 miles in length, it would not be right on the one hand for the railroad to demand actual compensation for the 90 miles, or, on the other hand, for the Government to maintain that the account should be adjusted on a basis of 140 miles and that amount passed to the credit of the railroad on the Government's books. *The non-aided line was used to replace the aided line,* and credit for the 90 miles only should be given the railroad on the Government's books. The same reasoning applies when the original line was aided in part.

"If of the original 140 miles . . . 103 were aided, and the accounts were so stated as to pay the railroad for 37 miles and carry 103 miles to the railroad's credit, the same ratio should be applied when transportation is over a new line between those points, and 103/140 of the total distance traversed should be con-

[8] Italics in quotations are added.

sidered as aided and should be carried to the railroad's credit on the Government's books, compensation for the balance of 37/140 being paid direct to the railroad."

Following these passages the Second Comptroller said: "If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles, as though the transportation were over the original line." This is the statement found in par. 1160, 3 Dig. 2d Comp. 299, on which the court of claims grounded its judgment.

Applying the generalization so attempted he ruled: "On this basis the accounts of the railroad coming to this bureau will be finally settled: I am of the opinion that substantial justice would thus be done—the railroad would not impair the security of the Government, and the Government would recognize the right of the railroad to make *improvements.*"

The crucial phrase of the generalization, "a new line or lines nonaided", would include mileage that is separate and distinct from an aided railroad maintained and kept in use between the same points. But the Second Comptroller, on the grounds that acquisition of new lines was the same as making additions and betterments to the original aided line and that Routes 2 and 3 were used to replace Route 1, treated the lines constituting the three routes as a single railroad bond-aided to the extent of 103 140 of its length.[9] It thus appears that the broad generalization does not express the principle of the decision or fit the situation described by it as mere betterment of the line built pursuant to the bond-aid contract.

The decision does not relate to the question in this case. Plaintiff does not contend that, if aided mileage of the Siskiyou stretch not used may be attributed to the Cascade stretch that was used to do the hauling in question, the corresponding percentage, 42.792 per cent, should not be applied. Plaintiff's point is that the find-

[9] Under our decisions, the contract extended only to the aided railroad. United States *v.* Kansas Pac. Railway Co., 99 U. S. 455. United States *v.* Central Pacific R. R. Co., 118 U. S. 235. As Route 2 had no aided mileage and Route 3 only 63 of its 151 miles, the Comptroller erred in treating the lines constituting the three routes as a single railroad.

ings preclude the assignment of any aided mileage to the nonaided Cascade stretch. The text of the Second Comptroller's decision shows that he did not decide or deal with any such issue.

2. Ruling of January 5, 1899 by Acting Comptroller Mitchell in a *Southern Pacific* case, V Dec. of Comp. of Treas. 364. See Diagram 2. A government clerk traveled to Sacramento via Stockton. A part of the route used was bond-aided. He returned via Benicia on the shorter and usually traveled nonaided route. The question was whether payment should be made to the company for transportation over the nonaided route. This decision merely follows the uncalled for and inapplicable generalization attempted by Second Comptroller Butler in the *Central Pacific* case.

3. Ruling of November 19, 1900 by Assistant Comptroller Mitchell in an *Illinois Central* case, VII Dec. of Comp. of Treas. 224. See Diagram 3. The company operated a land-aided railroad between Cairo and Chicago. It had two routes for passenger travel between Cairo and St. Louis: the shorter via Carbondale and Pinckneyville, had some unaided mileage; the longer, via Du Quoin, was aided throughout. The government having failed to designate either route and the shorter being the usually traveled one over which all through trains operated, the company carried the government passenger that way. The question was whether the land-grant deduction should be calculated on the percentage of land-aided mileage in the route used or on the greater percentage in the other route. Assistant Comptroller Mitchell did not follow the general statement of Second Comptroller Butler in the *Central Pacific* case but held that, as the government did not choose between the routes, the deduction should be calculated on the mileage used.

In the list of administrative rulings, cited by the government, this is the first one that involves construction of a land-grant Act. Land-aid differs essentially from bond-aid. Contracts in respect of the latter require government transportation over aided mileage at "fair and reasonable rates" and that the compensation earned be applied on the bond debt. No diminution of charges for government transportation is exacted. The railroad receives credit instead of cash for the charges calculated at full rates. But the land-grant Acts require service either free or at half rates forever. Questions as to compensation under them concern not merely form of payment

DIAGRAM 3.

Scale: Appx. 1 inch = 26 miles.

Hatched Lines Show Land-aided Mileage.

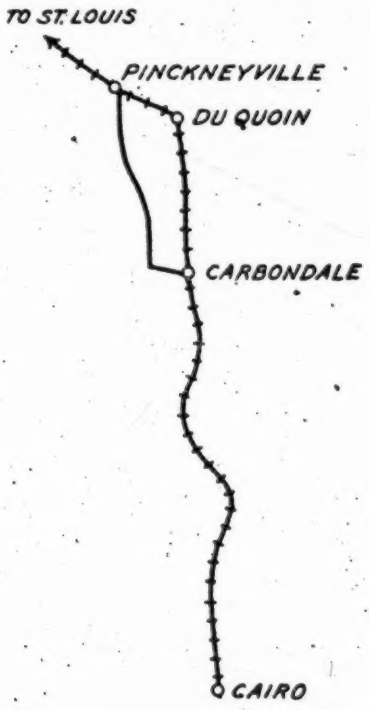
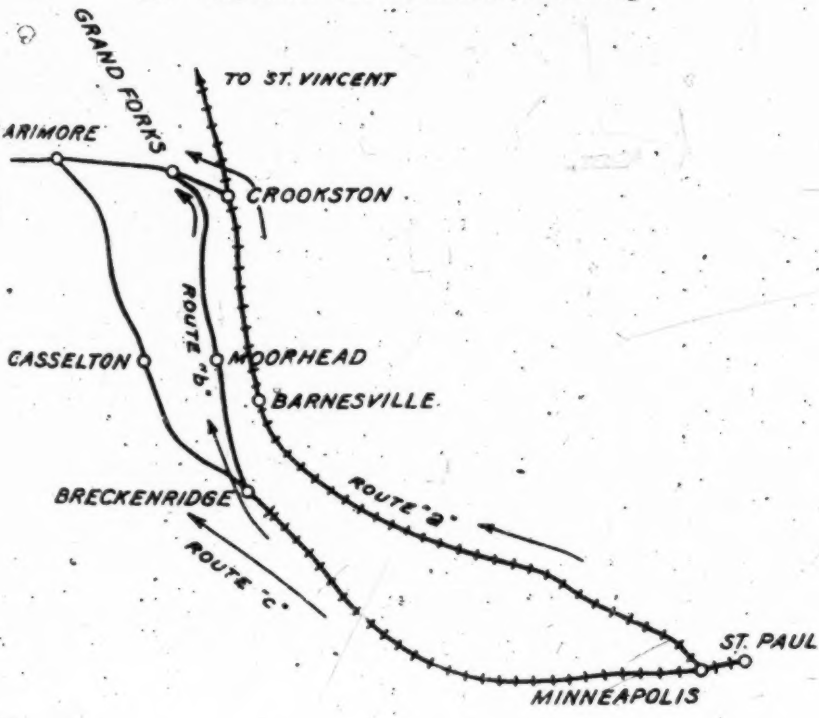


DIAGRAM 4.

Scale: Appx. 1 inch = 74 miles.

Hatched Lines Show Land-aided Mileage.



of full charges but the amount of payment. Unreasonable indeed would it be to hold that carriers' acquiescence in government construction of bond-aid Acts is binding or entitled to weight in cases involving construction of the land-grant Acts.

4. Ruling of January 21, 1902 by Comptroller Tracewell in a *Great Northern* case, VIII Dec. of Comp. of Treas. 474. See Diagram 4. The government shipped property from St. Paul, Minnesota, to points west of Larimore, North Dakota. The company had three routes between the points just named. The percentage of aided mileage in the route via Crookston, "a", is larger than that in either route "b" or "c". The government having failed to choose a route, the company hauled by the shortest route, "c"; it was generally used for like service. The question was whether land-grant deduction should be calculated on the percentage of the shorter line actually used or the higher percentage of the longer one not used.

The decision, as well as the quoted generalization, of Second Comptroller Butler are in terms broad enough to cover the question presented but Comptroller Tracewell, refusing to follow either, decided against the government's contention. He said: "Where, with Government aid, two separate and independent lines of railroad have been constructed from a common point to entirely different points, but which subsequently by extension and independent connections are projected through a common point, and all these lines have subsequently passed to the control of a single company, and transportation is furnished between such common points for the Government by the most usually traveled of said routes, deduction for land grant should be made on the basis of such route, in the absence of a contract or a request for transportation by the other route."

If followed, this ruling would require land-grant deduction in the case at bar to be calculated on the land-grant mileage of the Cascade Route used. Compare Diagrams 1 and 4.

5. Ruling of February 28, 1911 by Comptroller Tracewell in a *St. Louis, Iron Mountain & Southern* (*Missouri Pacific*) case. XVII Dec. of Comp. of Treas. 633. See Diagram 5. The company had a land-aided railroad between Birds Point, Missouri (on the west bank of the Mississippi opposite Cairo, Illinois) and Texarkana, Arkansas, via Dexter, Missouri. Government shipments from Cairo to Dexter were generally transported across the river at Birds

DIAGRAM 5.

Scale: Appx. 1 inch = 17 miles.

Hatched Lines Show Land-aided Mileage.

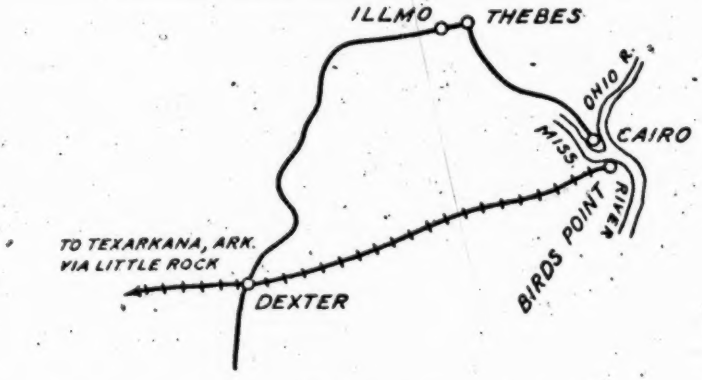
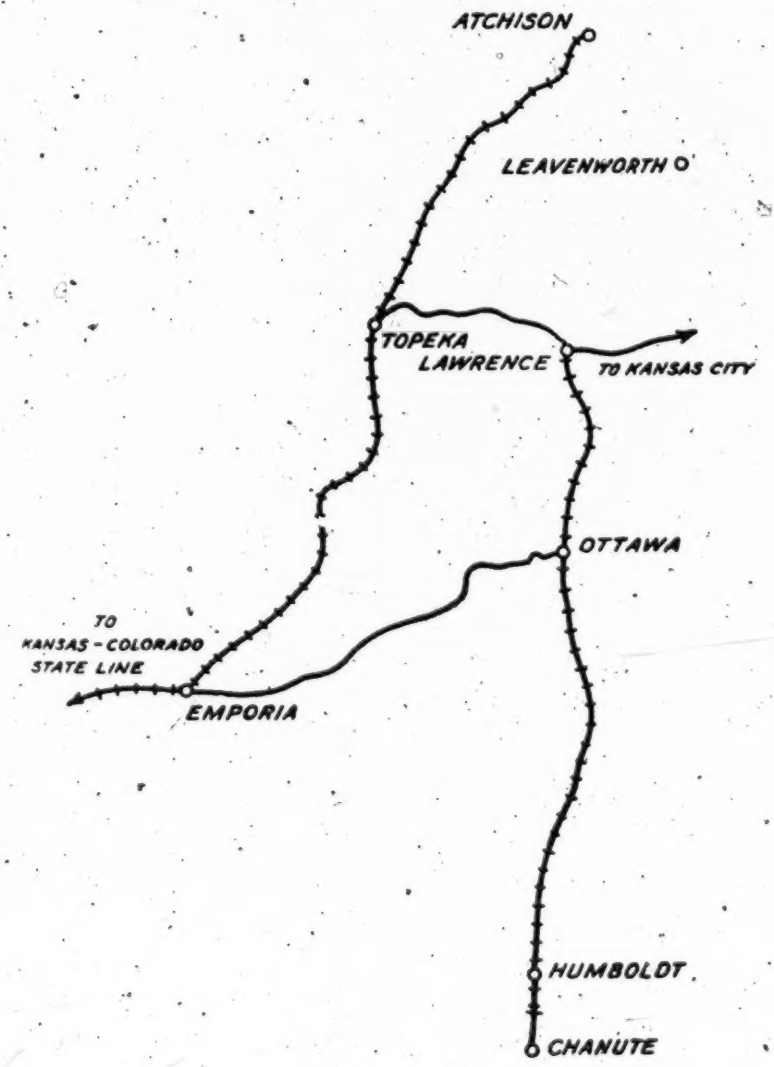


DIAGRAM 6.

Scale: Appx. 1 inch = 58 miles.

Hatched Lines Show Land-aided Mileage.



Poin nd thence by the land-aided line. On government shipments between Cairo and Texarkana by that route, 99.247 per cent was land aided. Because of a change in the bed of the river, it was necessary to haul the shipments in question via Thebes and Illmo. The land-grant deduction applicable to that route was 81.254 per cent. The railroad insisted that, having been forced to give up the old route, it should not be required to make deduction for the non-aided mileage between Cairo and Dexter via Thebes. But the Comptroller refused to accept that contention and ordered settlement on the basis of land-aided mileage in the route via Birds Point.

There is a fundamental difference between that case and the one before us. The carrier had abandoned the land-aided route for hauls between Cairo and Dexter. The Southern Pacific kept the Siskiyou Route in use.

6. Ruling of October 19, 1914 by Comptroller Downey in an *Atchison* case, XXI Dec. of Comp. of Treas. 238. See Diagram 6. The company has a line in Kansas between Lawrence and Chanute, land-aided to the extent of 91.3 miles and unaided as to 3.02 miles, part of the distance between Chanute and Humboldt. It has another line between Atchison and the Colorado boundary via Topeka and Emporia, all of which is land-aided. To connect these two aided lines there was built an unaided branch between Lawrence and Topeka and later another between Ottawa and Emporia. The government shipped cement from Chanute to Holbrook, Arizona. Earlier the shipment would have moved through Humboldt, Ottawa, Lawrence, Topeka, Emporia, and thence to point of destination. But, because of the construction of the branch between Ottawa and Emporia, the shipment in question was hauled over that line. By this route the haul between Chanute and Holbrook was 59.13 miles less than over the other route and aided mileage between those points was less by 91.42 miles. The Comptroller held that the land-grant deduction should be based on the land-aided mileage of the original route. He found that the land-grant Act (12 Stat. 772) required the aided railroads "to be and remain public highways for the use of the government" and that the branch lines made new through routes "to the abandonment, in part, of the aided through route." He said: "It has long been the holding of the accounting officers that the changing of a line of railroad and abandoning of any part of the original aided line does not deprive the Government of its original rights, and settle-

ment for service over the new line is, therefore, required to be made as if the transportation were over the original line. (See 3 Dig. Dec. 2d Comp. 299; V Dec. of Comp. of Treas. 364)".

As the ground on which that ruling rests is abandonment of a part of the aided line, it gives no support to the judgment before us.

7. Ruling of October 1, 1917 by Comptroller Warwick in a *Missouri Pacific* case, XXIV Dec. of Comp. of Treas. 193. The published report does not disclose the physical situation. It is indicated by Diagram 7 prepared on the basis of information found in an unpublished opinion in the same case rendered May 8, 1917. The government shipped stone from Batesville, Arkansas on an unaided line via Kansas City to Leavenworth Penitentiary, Kansas. An older route between the same points was via White River Branch Connection, Cairo Branch Connection, Carondolet Branch Connection, Pacific, and Kansas City. The ratio applicable in computing land-grant deduction for shipments hauled that way is 17.933 per cent. The Warden at Leavenworth paid the company for the service in question over the unaided line, without any land-grant deduction. However, the Comptroller held the carrier subject to the same percentage of deduction as applied to the aided route. On the company's application he granted rehearing, upheld the principle on which he ordered the deduction, and declared it would be applied to future shipments. But, in view of particular facts and equities involved, he concluded that the accounts paid prior to the date of the decision could be allowed without land-grant deduction.

It requires no discussion to show that the direct route used should have been chosen for the transportation in question. The Comptroller cited no land-grant contract to support the rule that he made applicable to future shipments. Nor did he cite Second Comptroller Butler's ruling or any case—and so far as disclosed by diligent research, briefs of counsel and this Court's opinion just announced—there is none that tends to sustain so incongruous an attribution of aided mileage not used to an unaided route used.

8. Ruling of October 27, 1923 by Comptroller McCarl in a *Southern Pacific* case, 3 Comp. Gen. 267. See Diagram 8. This case involved a government shipment from Marshall (Spokane), Washington to Roseburg, Oregon. It was routed over an unaided line of the Oregon-Washington Railroad & Navigation Company subject to an equalization agreement that charges would not exceed the amount payable had the service been by the land-grant line

DIAGRAM 7.

Scale: Appx. 1 inch = 100 miles.

Hatched Lines Show Land-aided Mileage.

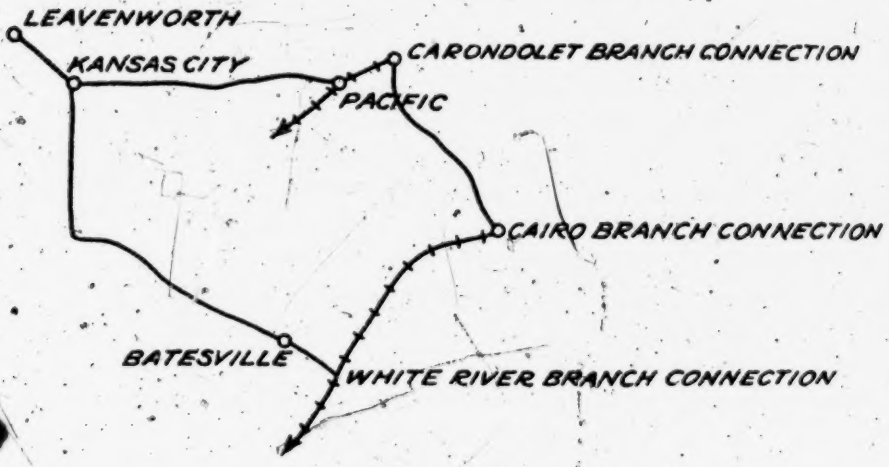
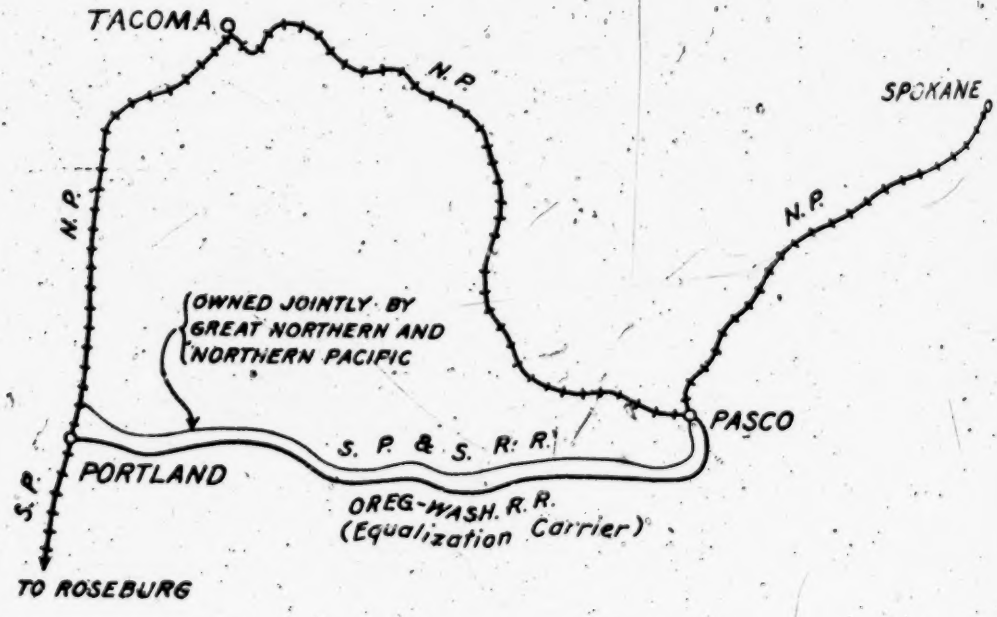


DIAGRAM 8.

Scale: Appx. 1 inch = 64 miles.

Hatched Lines Show Land-aided Mileage.



yielding the lowest net rate. The Northern Pacific line between Marshall and Portland via Pasco and Tacoma was land-aided. Later there was built between Pasco and Portland a line jointly owned by the Northern Pacific and the Great Northern; it is a part of the Spokane, Portland & Seattle Railway. Upon completion of that line, the Northern Pacific canceled its rates applicable between Marshall and Portland by its aided line through Tacoma and announced that the rates in its tariffs would only apply via the new unaided line. The Comptroller held that, as to the government transportation in question, the aided stretch of the Northern Pacific had been abandoned, and that the government was therefore entitled "to the transportation over the substituted line on the same basis as though transportation was furnished over the original land-grant line," and directed that land-grant deduction should be allowed.

That case differs from the one at bar in that the Northern Pacific, having no tariff applicable to the shipment via its aided line, had abandoned that line and for it substituted a new one.

9. The decisions in *Northern Pac. Ry. Co.* v. *United States* are next in chronological order. See Diagram 9, following page. On government request, the company transported two Marines by through passenger train from St. Paul to Seattle. The Northern Pacific land grant aided a route from a point on Lake Superior to one on Puget Sound. Pursuant to the terms of the statute (Act of July 2, 1864, 13 Stat. 365) the aided railroad was built from the terminal established at Ashland in Wisconsin to the one established at Tacoma in Washington. Neither St. Paul nor Seattle is or ever was a terminal on that or any other land-grant line of the Northern Pacific. See *United States* v. *Northern Pacific Ry. Co.*, 177 U. S. 435, 441. St. Paul is more than 100 miles off the aided line; Seattle, more than 50 miles. In the route traveled by the train in question the only aided mileage between St. Paul and the original Northern Pacific land-grant line is a stretch of about 20 miles between Watab and Little Falls, which is a part of the land-aided railroad between Watab and Brainerd constructed by the Western Railroad Company under the Act of March 3, 1857, 11 Stat. 195.[10] There is no aided mileage between Seattle and Palmer Junction, where the original line connects with the route used.

[10] Between Minneapolis and St. Paul the Northern Pacific uses, under an operating contract, 8.23 miles of land-aided road belonging to another company. That stretch was not involved in the litigation.

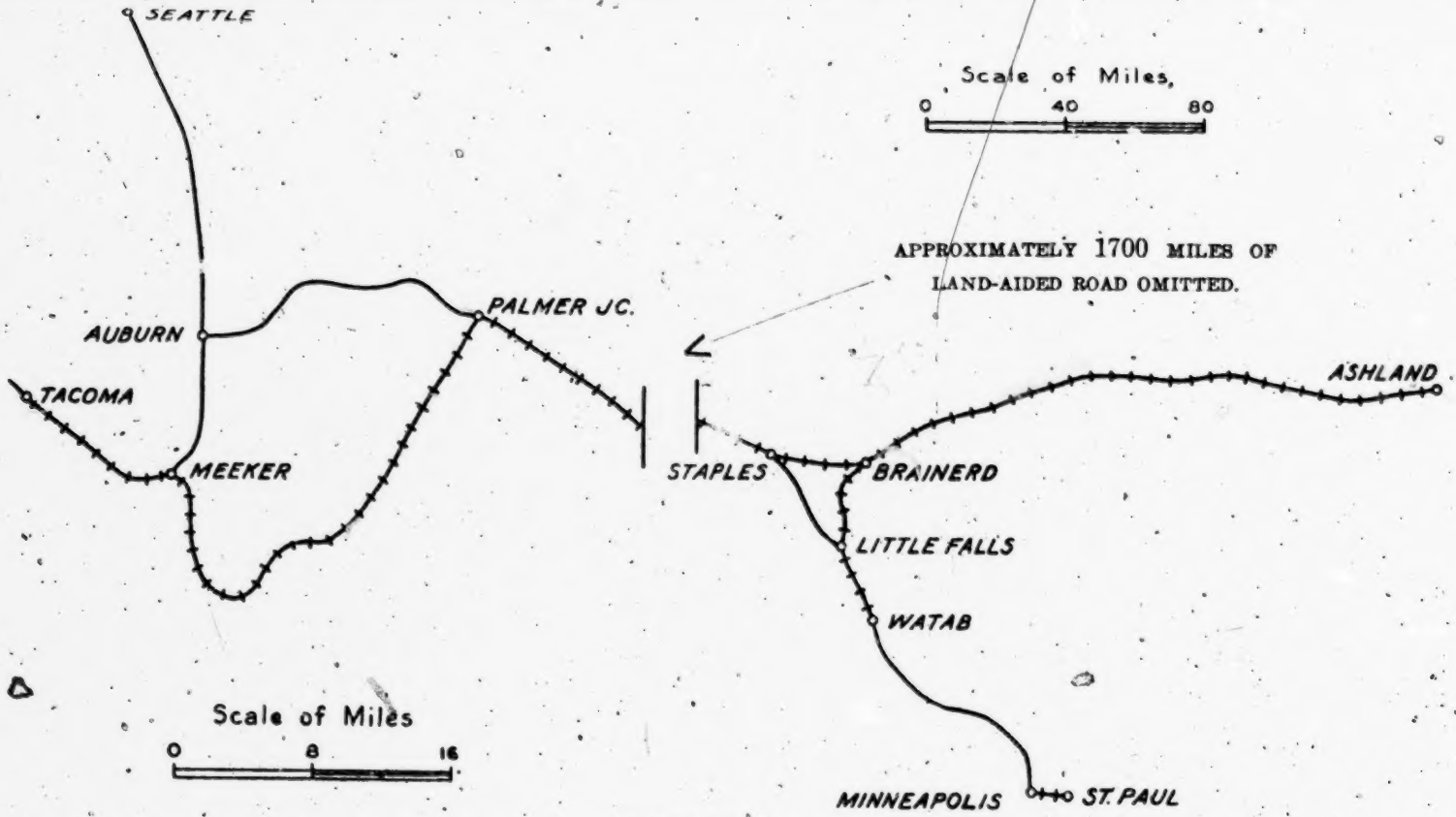


DIAGRAM 9.

Hatched Lines Show Land-aided Mileage

The issue in the case was whether, in addition to an undisputed deduction of 3 per cent, there should be deducted from the full commercial fare, $63.16, a land-grant percentage of 46.001 per cent, as claimed by the company, leaving a balance of $33.09, or 47.285 per cent, as claimed by the government, leaving a balance of $32.29. Thus the amount in issue as to each passenger was 80 cents.

The controversy arose from the fact that the government attributed to the route used the stretches of aided mileage between Little Falls and Staples via Brainerd and between Palmer Junction and Auburn via Meeker, amounting in all to 94.24 miles.

The government's theory was that the new unaided lines were "merely alternate or lieu routes—routes established by the railroad to shorten or straighten its line" and that therefore the calculation of land-grant deduction should take into account aided mileage not used to render the service in question. The district court refused so to interpret the facts and held the deduction should be calculated on mileage actually used. 22 F. 2d 858, 859. But the circuit court of appeals, one judge dissenting, found that the unused aided mileage had been abandoned. 30 F. 2d 655. And upon that interpretation of the stipulated facts, it said (p. 659): "It thus appears that except by this latter route [i.e. via unaided stretches between Little Falls and Staples, and between Palmer Junction and Auburn] through carriage by the Northern Pacific [from St. Paul] to the entire Pacific coast is abandoned." The facts clearly distinguish that case from the one now under consideration. It is here immaterial whether the judgment rests on a correct or erroneous interpretation of the stipulation on which the case was submitted. It is enough to say that the aided stretches were excluded by the company because not used and were included by the government on the ground that having been abandoned, they should be attributed to the route used.

10. Ruling of June 23, 1931 by Comptroller General McCarl in a *Missouri Pacific* case, 10 Comp. Gen. 522. See Diagram 10. The company constructed an unaided cut-off between Jedburg Junction and Eureka Junction, intermediate points on its land-aided line between St. Louis and Pacific. The distance between them via the cut-off is 2.99 miles. Over the old land-aided line via Glencoe, it is 4.93 miles. That track was still in use for some local trains. At another place on its line, within the city of St.

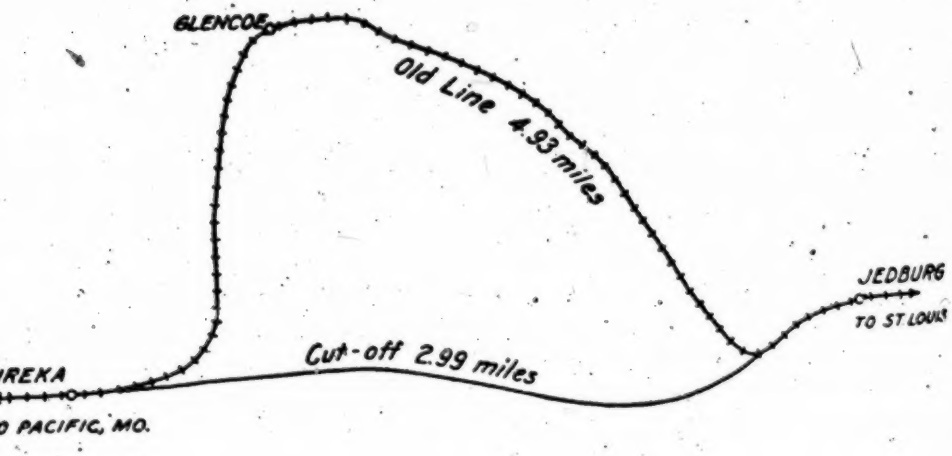
Louis, the company substituted 0.68 of a mile of nonaided line for a longer one which is aided. The Comptroller General held that the aided mileage not used should be attributed to the cut-off mileage used. He said: "It would seem to be too clear for serious argument that of the distances shown after the cut-off . . . between Eureka and Jedburg and the 0.68 miles from union station connection to the union station, or a total of 3.67 miles is not over the land-grant line, but it is equally clear that the new mileage of 3.67 miles was substituted for mileage over the original line for which grants of public lands were made."

It requires imagination to discover in that case anything in principle or in fact that will support the conclusion reached by the court of claims in the case at bar.

11. Ruling of January 16, 1936 by Comptroller General McCarl, 15 Comp. Gen. 614. It has no bearing upon the case at bar. The question was whether, in computing percentage of land grant deduction, the line of the Spokane, Portland & Seattle Railway between Pasco and Portland (see Diagram 8), owned jointly by the Northern Pacific and the Great Northern, is to be regarded as a Northern Pacific line. The Comptroller General answered in the affirmative.

DIAGRAM 10.

Hatched Lines Show Land-aided Mileage.



IV.

There is apparent attempt to draw from the Act of 1928 some support for the construction on which this Court affirms the judgment below. But, so far as concerns the question in this case, that Act does not indicate any congressional interpretation of the land-grant Act of 1866. The sole purpose of that measure was to substitute 50 per cent deduction in place of free transportation; it was passed in order to relieve the Southern Pacific of a burden to which other aided railroads were not subject. When it was enacted, May 23, 1928, only eight of the rulings above referred to had been made; two related to bond-aid contracts and are not in point; two were in favor of the railroads and do not support the judgment in this case. And, as above shown, none gives any support to the expansion of the terms of the contract that is here made. The 1928 Act was passed while the decision of the district court in the *Northern Pacific* case remained unreversed. 22 F. 2d 858 (1927). That case was not decided in the circuit court of appeals until 1929, 30 F. 2d 655. If the Act could be deemed to be a construction of the land-grant—as plainly it may not—it would have to be read as approving the decision of the district court, for that was the only judicial decision in that field.

V.

The land-grant line has been kept in use. The contract is that, where government transportation is wholly over that line, deduction of 50 per cent shall be made and that, where it is partly over that line, there shall be deducted the percentage that aided mileage used is of total haul. But this Court holds that, even if the government elects to have its freight move over a separate and distinct unaided railroad, the plaintiff is bound to apply the percentages applicable to charges for transportation over the aided line. Thus the decision implies a formula or rule to the effect that a land-grant deduction once found applicable to charges for transportation over a route made up of aided and unaided mileage between two points is to be applied to all subsequent government shipments between those points, even if the route actually used includes no aided mileage. There is nothing in this contract or in any of the railroad land-grant Acts, either as written or as hitherto construed, to warrant that construction.

I am of opinion that the judgment should be reversed.

Mr. Justice McReynolds and Mr. Justice Roberts join in this opinion.